

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Case No. 12-12020-mg

6 | In the Matter of:

8 RESIDENTIAL CAPITAL, LLC, et al.,

10 | **Debtors.**

18 | September 11, 2012

19 | Page

20 | Page

22 | B E F O R E:

23 HON. MARTIN GLENN

24 U.S. BANKRUPTCY JUDGE

1 AM SESSION

2 Status Conference RE: Debtors Motion Pursuant to Fed. R.
3 Bankr. P. 9019 for Approval of the RMBS Trust Settlement
4 Agreement [Docket No. 320]

5

6 (CC: Doc no. 1303) Notice of Supplemental Application Pursuant
7 to Sections 328 and 1103 of the Bankruptcy Code and Federal
8 Rule of Bankruptcy Procedure 2014 for an Order to Expand the
9 Scope of Retention of Moelis & Company LLC as Investment Banker
10 to the Official Committee of Unsecured Creditors of the Debtors
11 Nunc Pro Tunc to August 1, 2012

12

13 (CC: Doc no. 1281) Application Of The Official Committee Of
14 Unsecured Creditors For Entry Of An Order Authorizing The
15 Employment And Retention Of San Marino Business Partners LLC As
16 Consultant To The Committee, Nunc Pro Tunc To August 11, 2012
17 filed by Philip Bentley on behalf of Official Committee Of
18 Unsecured Creditors

19

20 (CC: Doc # 1248) Motion to Extend Exclusivity Period for Filing
21 a Chapter 11 Plan and Disclosure Statement/Debtors' Motion for
22 the Entry of an Order Extending Their Exclusive Periods to File
23 a Chapter 11 Plan and Solicit Acceptances Thereof

24

25 (CC: Doc # 1245) Debtors' Motion for an Order Pursuant to

1 Section 365(d)(4) of the Bankruptcy Code Extending the Time
2 Within Which Unexpired Leases of Nonresidential Property May Be
3 Assumed or Rejected

4

5 (CC: Doc #90, 47, 1275) Hearing RE: Stipulation RE: Motion
6 Authorizing the Debtors to Continue to Perform Under The Ally
7 Bank Servicing Agreements In The Ordinary Course of Business.
8 This matter was filed under notice of presentment.

9

10 (CC: Doc # 1173) Motion for Relief from Stay in regards to
11 property located at 33 North Church Street, Ortonville,
12 Michigan

13

14 (CC: Doc. 1171) Motion for Relief from Stay in regards to
15 property located at 184 Dahlia Drive, Mastic Beach, New York

16

17 (CC: Doc #1182) Motion for Relief from Stay in regards to
18 property located at 631 20th Street SW, Vero Beach, Florida

19

20 (CC: Doc #1162) Motion for Relief from Stay in regards to
21 property located at 1917 East Concord Street, Orlando Florida

22

23 (CC: Doc #1057) Motion for Relief from Stay in regards to
24 property located at 2 Hill Dale Avenue, Miller Place, NY

25

1

2 (CC: Doc #1059) Motion for Relief from Stay in regards to
3 property located at 3597 West 127th Street, Cleveland, Ohio

4

5 PM SESSION

6 Doc.#810, 859, 861 Evidentiary Hearing Regarding (I) Motion of
7 the Federal Housing Finance Agency Pursuant to the July 11,
8 2012 Order of the Honorable Denise L. Cote Seeking Limited
9 Discovery from the Debtors and, if Necessary to that Purpose,
10 Relief from the Automatic Stay and (II) Supplement to July 17,
11 2012 Motion of the Federal Housing Finance Agency Pursuant to
12 the July 11, 2012 Order of the Honorable Denise L. Cote Seeking
13 Limited Discovery from the Debtors and, if Necessary to that
14 Purpose, Relief from the Automatic Stay. (CC: document(s)
15 1295, 1296, 1297)

16

17

18

19

20 Transcribed by: Ellen S. Kolman

21 eScribers, LLC

22 700 West 192nd Street, Suite #607

23 New York, NY 10040

24 (973)406-2250

25 operations@escribers.net

1 A P P E A R A N C E S :

2 MORRISON & FOERSTER LLP

3 Attorneys for Debtors

4 1290 Avenue of the Americas

5 New York, NY 10104

6

7 BY: GARY S. LEE, ESQ.

8 JAMIE A. LEVITT, ESQ.

9 LORENZO MARINUZZI, ESQ.

10 ANTHONY PRINCI, ESQ.

11 NORMAN S. ROSENBAUM, ESQ.

12 JOEL C. HAIMS, ESQ.

13 JONATHAN C. ROTHBERG, ESQ

14

15 KRAMER LEVIN NAFTALIS & FRANKEL LLP

16 Attorneys for Official Creditors' Committee

17 1177 Avenue of the Americas

18 New York, NY 10036

19

20 BY: DOUGLAS MANNAL, ESQ.

21 RACHAEL L. RINGER, ESQ.

22 KENNETH ECKSTEIN, ESQ.

23 PHILIP BENTLEY, ESQ.

24 JOSEPH SHIFER, ESQ. (TELEPHONICALLY)

25 ELISE S. FREJKA, ESQ.

1 CADWALADER, WICKERSHAM & TAFT LLP

2 Attorneys for MBIA

3 One World Financial Center

4 New York, NY 10281

5

6 BY: GREGORY M. PETRICK, ESQ. (TELEPHONICALLY)

7

8

9 CARTER LEDYARD & MILBURN LLP

10 Attorneys for Talcott Franklin Group Investors

11 2 Wall Street

12 New York, NY 10006

13

14 BY: AARON R. CAHN, ESQ.

15

16

17 CLEARY GOTTLIEB STEEN & HAMILTON LLP

18 Attorneys for Wilmington Trust as Indenture Trustee

19 One Liberty Plaza

20 New York, NY 10006

21

22 BY: SEAN A. O'NEAL, ESQ.

23

24

25

1 CRAVATH, SWAINE & MOORE LLP

2 Attorneys for Credit Suisse First Boston

3 825 Eighth Avenue

4 New York, NY 10019

5

6 BY: LAUREN A. MOSKOWITZ, ESQ.

7

8

9 DECHERT LLP

10 Attorneys for Bank of New York Mellon

11 1095 Avenue of the Americas

12 New York, NY 10036

13

14 BY: GLENN E. SIEGEL, ESQ.

15

16

17 GIBBS & BRUNS LLP

18 Attorneys for RMBS Steering Committee

19 1100 Louisiana

20 Suite 5300

21 Houston, TX 77002

22

23 BY: KATHY D. PATRICK, ESQ.

24

25

1 JONES DAY

2 Attorneys for Financial Guaranty Insurance Company

3 555 South Flower Street

4 Fiftieth Floor

5 Los Angeles, CA 90071

6

7 BY: RICHARD L. WYNNE, ESQ. (TELEPHONICALLY)

8

9

10 KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

11 Attorneys for FHFA

12 1633 Broadway

13 New York, NY 10019

14

15 BY: KANGHANA WANGKEO LEUNG, ESQ.

16 ANDREW K. GLENN, ESQ.

17 DANIEL A. FLIMAN, ESQ.

18

19 KIRKLAND & ELLIS LLP

20 Attorneys for Ally Financial Inc. and Ally Bank

21 655 Fifteenth Street, N.W.

22 Washington, D.C. 20005

23

24 BY: PATRICK M. BRYAN, ESQ.

25 JUDSON D. BROWN, ESQ.

1

2 KIRKLAND & ELLIS LLP

3 Attorneys for Ally Financial Inc. and Ally Bank

4 601 Lexington Avenue

5 New York, NY 10022

6

7 BY: RAY C. SCHROCK, ESQ.

8

9

10 LOEB & LOEB, LLP

11 Attorneys for Trustee, Wilmington Trust National

12 Association

13 345 Park Avenue

14 New York, NY 10154

15

16 BY: WALTER H. CURCHACK, ESQ. (TELEPHONICALLY)

17

18

19 MAYER BROWN LLP

20 Attorneys for Ally Financial, Inc.

21 1999 K Street, N.W.

22 Washington, DC 20006

23

24 BY: REGINALD R. GOEKE, ESQ.

25

1

2 MAYER BROWN LLP

3 Attorneys for Ally Financial, Inc.

4 1675 Broadway

5 New York, NY 10019

6

7 BY: MICHAEL O. WARE, ESQ.

8

9

10 MCKOOL SMITH

11 Attorneys for Freddie Mac

12 600 Travis Street

13 Suite 7000

14 Houston, TX 77002

15

16 BY: PAUL D. MOAK, ESQ. (TELEPHONICALLY)

17

18

19 MORGAN, LEWIS & BROCKIUS LLP

20 Attorneys for Deutsche Bank

21 101 Park Avenue

22 New York, NY 10178

23

24 BY: JAMES L. GARRITY, JR., ESQ.

25

1 MUNGER, TOLLES & OLSON LLP

2 Attorneys for Berkshire Hathaway

3 355 South Grand Avenue

4 35th Floor

5 Los Angeles, CA 90071

6

7 BY: THOMAS WALPER, ESQ. (TELEPHONICALLY)

8

9

10 ROPES & GRAY LLP

11 Attorneys for RMBS Steering Committee

12 1211 Avenue of the Americas

13 New York, NY 10036

14

15 BY: KEITH H. WOFFORD, ESQ.

16

17

18 SEWARD & KISSEL LLP

19 Attorneys for U.S. Bank NA as Securitization Trustee

20 One Battery Park Plaza

21 New York, NY 10004

22

23 BY: MARK D. KOTWICK, ESQ.

24 ARLENE R. ALVES, ESQ.

25

1 SIDLEY AUSTIN LLP

2 Attorneys for Nationstar Mortgage

3 One South Dearborn

4 Chicago, IL 60603

5

6 BY: JESSICA C.K. BOELTER, ESQ. (TELEPHONICALLY)

7 LARRY J. NYHAN, ESQ. (TELEPHONICALLY)

8

9 U.S. DEPARTMENT OF JUSTICE

10 Office of the United States Trustee

11 33 Whitehall Street

12 21st Floor

13 New York, NY 10004

14

15 BY: MICHAEL DRISCOLL, ESQ.

16

17 WHITE & CASE LLP

18 Attorneys for Ad Hoc Group of Junior Secured Noteholders

19 1155 Avenue of the Americas

20 New York, NY 10036

21

22 BY: J. CHRISTOPHER SHORE, ESQ.

23 HARRISON DENMAN, ESQ.

24 IAN J. SILVERBRAND, ESQ.

25

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**
2 **P R O C E E D I N G S**

13

2 THE COURT: All right. Please be seated. We're here
3 in Residential Capital LLC, number 12-12020.

4 Mr. Princi?

5 MR. PRINCI: Good morning, Your Honor. There are a
6 number of matters on the agenda for today. The first one,
7 Judge, which I'm going to address on behalf of debtors and just
8 direct --

9 THE COURT: Can you pull the microphone a little bit
10 closer, please?

11 MR. PRINCI: Yes. Excuse me. For the record, Anthony
12 Princi from Morrison & Foerster on behalf of the debtors.

13 And the first matter on the agenda, Your Honor, is the
14 status conference respecting the debtors' 9019 motion for
15 approval of its RMBS trust settlement.

16 THE COURT: Before you get to that --

17 MR. PRINCI: Yes, Your Honor.

18 THE COURT: -- let me just ask you a question.

19 The amended agenda starts with listing adjourned
20 matters, a very large number of lift stay motions, and it
21 indicates, I think, in all cases they're being adjourned to
22 September 27th. I'd just like a little explanation.

23 First, the question is has the moving party consented
24 to the adjournment. And second, are we just kicking the can
25 down the road in one hearing. What is happening?

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

14

1 MR. LEE: The answer to your first question, Your
2 Honor, is yes, and the answer to your second question is no.
3 There have been a number of stipulations that have been
4 executed between the parties resolving the lift stay motions
5 and the expectation is between now and that date we will do
6 what we've done in relation to most of them which is resolve
7 them, Your Honor.

8 THE COURT: Thank you very much, Mr. Lee.

9 MR. LEE: Thank you.

10 THE COURT: Mr. Princi, go ahead.

11 MR. PRINCI: Thank you, Judge.

12 Judge, I'll start by noting what I believe the Court
13 has received with respect to this matter. So the debtors, Your
14 Honor, filed a short status report on Friday regarding this
15 matter. And I believe yesterday both the committee and MBIA
16 filed also short responses to that. I just want to make sure
17 the Court has --

18 THE COURT: I've got them.

19 MR. PRINCI: Okay. So, Judge, let me see if I can,
20 perhaps, shed some light instead of heat on what has happened
21 and where we are.

22 The jumping off point, of course, Your Honor, is that
23 we filed this motion on June 14th, so it's approximately three
24 months ago. The Court's aware of the history. We had -- we
25 had a hearing on July 24th at which there were competing

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

15

1 scheduling orders: one submitted by the trustees jointly with
2 the committee and one submitted by the debtor. Based on the
3 Court's instructions, the parties spent a number of consecutive
4 dates at Morrison & Foerster's offices and we were able to work
5 out a schedule that was agreeable to all parties which we
6 jointly submitted to the Court.

7 The "we" here, Your Honor, when I say "we," that's the
8 debtors, the institutional investors who are the counterparty
9 under the settlement agreement, the creditors' committee, the
10 trustees for the RMBS trusts, and Ally Financial, the parent
11 company of the debtors. MBIA participated in all those
12 negotiations but did not jointly submit that order to Your
13 Honor.

14 Consistent with that order, Your Honor, and I should
15 say that there were -- thank you -- I should say, Your Honor,
16 that at the earlier hearing, the Court had obvious and
17 understandable consternation about how the parties were
18 approaching this and I think it's fair to say on the one side,
19 the debtors and the institutional investors were pushing for
20 the most expedited schedule and the committee, in particular,
21 with MBIA I would guess, were pushing for the most lax, if you
22 will. In fact, I think the committees' position, then, on July
23 24th, Your Honor, as I recall was that there really should be
24 sort of an open date. And let's do what we can, let's work
25 hard and then let's come back to you, see where we are and then

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

16

1 you can give us a date at that time.

2 I think Your Honor made clear on the 24th what we have
3 been working off of which is that we, the debtors, and more
4 importantly, I think, the institutional investors who have the
5 skin in the game are entitled to get a ruling from this Court
6 as to the merits of that settlement and that, I think, as Your
7 Honor pointed out in the 24th, this wasn't going to be just
8 left hanging out there.

9 Post the submission of that order and the entry of the
10 order by the Court and consistent with the understanding of all
11 the parties, we began to incorporate certain amendments into
12 the settlement agreement with the exception of one that's
13 caused issues for certain parties. Those amendments were
14 understood by the parties. The parties understood there were
15 going to be amendments and the parties tried the best as they
16 could to --

17 THE COURT: I didn't understand there were going to be
18 amendments.

19 MR. PRINCI: I believe -- Your Honor, I could be
20 wrong. I --

21 THE COURT: Well, let's put it --

22 MR. PRINCI: -- I believe the scheduling orders --

23 THE COURT: Wait. Stop.

24 MR. PRINCI: -- indicates that.

25 THE COURT: Mr. Princi, until I read the status

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

17

1 reports, maybe I had been told; if so, it had gone right over
2 my head and I didn't understand that this is a moving target
3 that the objectors have to deal with. So it is what it is.

4 MR. PRINCI: Understood.

5 THE COURT: Go ahead.

6 MR. PRINCI: Understood. And, I think, Judge, you've
7 hit the nail on the head with respect to the complaint. I
8 think the substantive complaint and the one that we have
9 attempted to resolve is that this is a moving target. It's not
10 a moving target. It became, I think a fair argument in that
11 regard can be made with respect to the so-called Holdco
12 election which I'm going to address in a moment. But the rest,
13 Your Honor, of the changes quite candidly just were not
14 substantive and they were -- they were understood by the
15 parties who negotiated this. So we, I think, we actually, Your
16 Honor --

17 THE COURT: Let me stop you here, Mr. Princi.

18 MR. PRINCI: Yes. Sure.

19 THE COURT: Until there is something that can be
20 considered final, this remains a moving target. My immediate
21 concern is more than amendments because it's quite common, as
22 you know, that when agreements are presented to the Court and
23 parties seek approval in light of objections and things like
24 that there often are changes and that doesn't particularly
25 disturb me nor that there will be changes to this agreement.

RESIDENTIAL CAPITAL, LLC, ET AL.

18

1 That, in itself, is not at issue. I'm, frankly, more concerned
2 that -- over the status of the discovery. There was a
3 scheduling order that was agreed to. You filed a status report
4 on Friday. It indicated that discovery is substantially on
5 track. Then I read the committee's report yesterday, and it
6 certainly appears that discovery is not on track. The setting
7 of a November 1st -- November 5th hearing was premised on
8 substantially complete discovery in accordance with the
9 schedule that everyone agreed upon and that I approved, okay?
10 I left it to the parties to negotiate the schedule. They did
11 so and I told them, look, if you can't agree, I will do so, but
12 it's better when the parties do that.

13 The parties did that. They presented the Court with
14 an agreed schedule. The Court entered it. It's the operative
15 document. I don't underestimate the task that's involved on
16 all parties -- for all parties in complying with a schedule.
17 You wanted a hearing as soon as possible. Okay. There were
18 others who wanted the schedule moved out. I believe I made it
19 clear from the start that going forward with an aggressive
20 schedule was contingent upon complying with all discovery
21 obligations. The committee or any other objectors are entitled
22 to full discovery and an opportunity to prepare for all of the
23 issues that are going to be raised at the hearing.

24 This is, to put it euphemistically, a huge deal.
25 You're seeking approval of a settlement that would provide an

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

19

1 allowed claim of 1 -- 8.7 billion dollars. It has enormous
2 consequences for this case as a whole. That's fine. I'll go
3 ahead. But you've already failed to comply with the agreed
4 schedule.

5 The changes that you may be negotiating to try and
6 deal with objections that have been raised informally or
7 formally, that's pretty standard. It may be that when we get
8 to a date for a hearing, the changes will be so substantial
9 that parties will be objecting: they've changed the deal, we
10 haven't had an opportunity to prepare, this raises new issues.
11 I don't know. I'm not going to prejudge any of that. But the
12 process of amending agreements, that's pretty common; I see
13 that all the time.

14 But the one thing that I won't abide, I want to make
15 it crystal clear, your November 5th hearing date is
16 substantially in jeopardy right now because you've not complied
17 with the schedule that was agreed to by the parties and so
18 ordered by the Court.

19 MR. PRINCI: Okay. Your Honor, a couple of things.
20 There's a -- there's some basic propositions that you've
21 stated, they've been stated by other parties; I just want to
22 make sure that we're on the record as being absolutely clear
23 that we're in full agreement.

24 This is a settlement of significant proportions. I
25 think the term that the committee used in its response to our

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

20

1 status report was "historic". The magnitude is immense of this
2 settlement. And, of course, Your Honor's absolutely right and
3 I don't say that to be solicitous because it's obvious that in
4 a situation like that, all parties have to have the opportunity
5 for full discovery, and we're working towards that goal.

6 The other goal, though, Your Honor, that we are also
7 working towards, and, so this does create the reason why, Your
8 Honor, we have been, if you will, "pushing" is the desire to
9 make sure of two things which we think is also historic and
10 monumental and even more important than settling, if you will,
11 this claim. One is, Judge, the sale of the servicing rights of
12 this debtor. Those servicing rights, Your Honor, are an
13 intangible asset. They are only as good as the body of people
14 who perform the services. It's fragile, Judge. It is like
15 when an investment banker of a servicing company files for
16 Chapter 11 protection; you have that rush at the beginning of
17 the case to try to sell the platform before it dissolves.

18 Now, we have maintained good order and we have kept it
19 together and we have a contract with a real purchaser who's
20 got -- who's creditworthy and can get this deal done, and we
21 may get a higher bidder, perhaps. But a big focus of ours,
22 Judge, is in balancing the issues here to make sure we don't
23 lose that sale.

24 Now, how do the two intersect? Well, one of the big
25 things that we were able to do in connection with the last

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

21

1 scheduling order, was to get substantive concessions from the
2 investor group and the trustees with respect to the sale
3 process that is going to allow the sale process to go forward
4 unencumbered by very serious legal issues that this Court would
5 otherwise have to resolve and for which, therefore, the debtors
6 and their estate have risk in the event that the Court does not
7 resolve it in debtors' favor.

8 For example, Your Honor's heard me to say at prior
9 hearings before we got those concessions from the trustees and
10 the institutional investors that the way in which we were going
11 to deal with the legacy claims, the putback claims and how we
12 were going to not -- how we were going to assume and assign the
13 benefits, if you will, of those contracts but not have the
14 purchasing party get burdened with the legacy claims --

15 THE COURT: I'm still waiting to see how you're going
16 to accomplish that, frankly. We'll see.

17 MR. PRINCI: Well, Judge -- Judge, how we are
18 accomplishing it is that the trustees have waived their claim
19 in that regard with respect to the sale. In other words,
20 they're preserving that claim --

21 THE COURT: Well, look --

22 MR. PRINCI: -- for afterwards.

23 THE COURT: -- I've read it and it's one of the
24 questions I have because I read the pre-auction objections;
25 August 23rd was the deadline for it. What I didn't see in the

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

22

1 schedule is when you're going to respond to the pre-auction
2 objections. And I gather, what, the hearing on the pre-auction
3 objections is October 17th, is that -- am I right on that? Am
4 I correct in that, Mr. Princi? Is it October 17th?

5 MR. PRINCI: I unfortunately would have to check, Your
6 Honor. I've been told yes, Judge.

7 THE COURT: Okay. When are you responding to the
8 pre-auction objections?

9 MR. PRINCI: Excuse me one second, Judge. Excuse me
10 one moment.

11 THE COURT: Go ahead.

12 MR. PRINCI: Thank you, Judge.

13 So Judge, the objection date is October 10 but I think
14 what's critically important --

15 THE COURT: When you say the objection deadline --

16 MR. PRINCI: Excuse me, the re --

17 THE COURT: -- when are you responding --

18 MR. PRINCI: -- pardon me. I believe October 10,
19 Judge. Pardon me, I misspoke. But, Judge, what I have to
20 clear up, what's critically important is to understand what
21 those objections relate to and what they no longer relate to
22 because of what was agreed to in the scheduling order.

23 THE COURT: Look, they were just filed; it was filed
24 August 23rd. I just read them, okay?

25 MR. PRINCI: Okay.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

23

1 THE COURT: They're serious objections that go to the
2 basic issue of whether you can separate the burdens and the
3 benefits. Here it is. It's -- I brought it out on the bench
4 with me. Are you saying that's no longer operative?

5 MR. PRINCI: Judge, first of all, we're working those
6 out, so I think we're relatively confident, Judge, that those
7 issues will be resolved without the need for judicial
8 determination. But the real -- the objections that I'm
9 referring to, Judge, which is effectively a deal breaker, okay,
10 is the argument that you cannot sever the putback claims, all
11 of the putback claims. And were that to have to be decided
12 prior to the sale and were there to be an adverse ruling, we
13 wouldn't have a sale. We would be losing billions of dollars
14 because --

15 THE COURT: Tell me something.

16 MR. PRINCI: Yes.

17 THE COURT: I just read -- I thought I brought them
18 out and maybe I didn't -- here it is, it was dated August 23rd,
19 it's denominated pre-auction objections of the RMBS trustees to
20 the debtors' sale motion.

21 MR. PRINCI: Okay.

22 THE COURT: You're saying those are being worked out?

23 MR. PRINCI: Yes. But, Judge, let me just clarify
24 this because --

25 THE COURT: Because they went to the issue of whether

RESIDENTIAL CAPITAL, LLC, ET AL.

24

1 you could separate the burdens and the benefits.

2 MR. PRINCI: Understood but let me explain the
3 magnitude of those, Judge, okay. We're talking if we lose,
4 Judge, if we don't resolve them and if we have to come to the
5 Court, we're talking order of magnitude we estimate twenty-five
6 million dollars max. Meaning it's not a deal breaker, Judge.

7 What those go to is that there is an indemnification
8 provision in all of these pooling and servicing agreements for
9 the trustee's, understandably. And what Nationstar has agreed
10 to assume in connection with the assumption and the assignment,
11 in connection with the asset purchase agreement is they are
12 agreeing to assume that indemnification obligation but only as
13 to events that occur and give rise to claims post-closing.

14 THE COURT: I've read it.

15 MR. PRINCI: Okay.

16 THE COURT: I understand.

17 MR. PRINCI: And, so that, Your Honor, that pre-
18 closing -- that pre-closing gap, if you will, relates to claims
19 that if we were to have to pick those up, because at the end of
20 the day, Judge, our view as to the law is that if we don't
21 resolve this, and we believe we will, there's a good argument
22 on the trustee's part that that will be a cure claim.

23 Now, what is the amount of a cure claim, it's going to
24 be, obviously, left to the Court if we litigate it, but we have
25 a history, Judge, of data when it comes to these sort of

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

25

1 indemnification costs. And so our estimate is what I gave you
2 earlier. So that is not a deal breaker.

3 What is a deal breaker is the same concept applied to
4 the putback claims, and that is a critical, absolutely critical
5 substantive right that we negotiated for in the context of a
6 scheduling order. And what the trustees have done is the
7 trustees have agreed they will not assert that claim, have that
8 claim attach to the sale. They are preserving that claim
9 subject to very, very limited caps for post-sale. In the event
10 we don't work those claims out, then those will be litigated,
11 but the order of magnitude is dramatically different because of
12 the caps. Dramatically, dramatically different.

13 Now, we do not want to lose those substantive
14 provisions that we negotiated for.

15 THE COURT: Okay. So let me stop you there. I
16 understand you don't want to lose it, I will accept that it is
17 of monumental importance to this case. You're going to hear me
18 express my frustration when we get to the exclusivity motion,
19 as well. I'm not very happy about the pace at which this case
20 is proceeding and the level of cooperation with the committee
21 and others regarding -- I understand these are all -- all these
22 things you're dealing with you say that there's cooperation
23 about issues; the committee says and Wilmington Trust says and
24 Aurelius says they won't negotiate a plan. They won't
25 negotiate a plan.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

26

1 You have an agenda. You started with your agenda on
2 day one. That's fine. I'm prepared -- I was prepared to move
3 this case at the pace you wanted conditioned on your complying
4 with all of your discovery obligations. I don't want to hear,
5 right now, Mr. Princi, how important holding this RMBS deal
6 together is. I accept it's very important. But the other side
7 of that, if you want to hold it together, you have to fully
8 comply.

9 I don't particularly care the magnitude of the effort
10 it's going to require on the part of the debtors and its
11 professionals to do that. If you want to stick to the
12 schedule, if you want a November 5 hearing, you have to comply
13 with the order. I don't think I can make it any clearer.

14 MR. PRINCI: Understood.

15 THE COURT: And I'm going to add to your woes because
16 I will tell you right now, from November 30th to December 16th
17 I will be out of the country. If you don't hold to your
18 November 5 date, it will be next year when you get a hearing.

19 MR. PRINCI: Okay.

20 THE COURT: I don't think I can be any clearer about
21 it. Given the schedule that this Court has with this and other
22 matters, if you can't hold to the schedule, it's going to be
23 your doing, okay? This hearing will not be pushed to late
24 November, okay.

25 MR. PRINCI: Your Honor --

RESIDENTIAL CAPITAL, LLC, ET AL.

27

1 THE COURT: It will be next year. So you got a lot --
2 if it's as important as you say to hang onto these dates, you
3 got a lot of work to do and you'd better get it done. I'm not
4 saying it was bad faith or anything. I don't doubt the
5 magnitude of the task you have in complying with everything
6 that's on the table right now: the examiner's investigation,
7 the committees' expedited discovery or other party stuff.
8 There's a lot going on. I understand that.

9 MR. PRINCI: Your Honor, I hear you loud and clear; we
10 hear you loud and clear with respect to the discovery issue.
11 Let me address that head on.

12 First, Your Honor, I must say with all due respect I
13 disagree with the Court's view that we have not complied with
14 discovery in a material sense. Of course, Judge, there's times
15 when there --

16 THE COURT: Look, there are always odds and ends in
17 every big case with discovery.

18 MR. PRINCI: Okay.

19 THE COURT: That's not what I'm worried about.

20 MR. PRINCI: Okay. And, Judge, just one thing as a --

21 THE COURT: You're saying the committee has been
22 inaccurate in what they say the state of discovery is and the
23 open issues.

24 MR. PRINCI: And I want to address that.

25 THE COURT: Is that true?

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

28

1 MR. PRINCI: That is incorrect at a fundamental level.

2 And I want to addr --

3 THE COURT: The committee is incorrect at a
4 fundamental level?

5 MR. PRINCI: The committee is incorrect at a
6 fundamental level with respect to its allegation in that
7 regard.

8 I want to, Judge, say that we are concerned about the
9 procedural posture in which we find ourselves with the
10 discovery allegation given the obvious significance to how it
11 will affect our substantive rights. Our understanding, Judge,
12 and we've heard you loud and clear a number of times with
13 respect to how you handle discovery disputes, is that if
14 there's a discovery dispute we don't have to end up in two
15 weeks of motion practice; we put it before the Court and you do
16 a good job of resolving those things by looking parties in the
17 eyes and telling them how you think this should be resolved.

18 We'd like that opportunity, Judge, to be heard.
19 We're -- I am very concerned, Judge, about getting a pleading
20 last night that -- and let me just give you background so you
21 understand where we're coming from, Judge.

22 Last Wednesday, we sent -- I have the letter with
23 me -- we sent the creditors' committee a multi-page detailed
24 recitation of all of the discovery that we've provided, all the
25 discovery requests that they made in a categorical fashion and

RESIDENTIAL CAPITAL, LLC, ET AL.

29

1 the responses we've provided them.

2 The first paragraph says to Mr. Eckstein, "We are
3 providing you with this letter because we have a status
4 conference coming up this coming Monday, so we thought it would
5 be helpful if we show you, if we walk you through what we think
6 the progress on discovery has been to date." And then, at the
7 end, and it's one, two, three, four, five, six full pages, and
8 at the end, we say, "We hope you'll agree with this summary of
9 our discovery and we're available to discuss the matter at your
10 convenience."

11 The guts of this, in shorter form, is in the status
12 report. We did not hear from the creditors' committee with
13 respect to this letter. And then, I see in the creditors'
14 committee's status report two things that are disturbing. The
15 one is the allegation that we failed in our discovery request.
16 Well, you know what, I think in the case of this matter, or any
17 case, but particularly given Your Honor's rules of court, if
18 you will, it would have made more sense and it still makes more
19 sense for us to confer and really see, Your Honor -- because
20 I'm going to get more specific about this in a moment -- where
21 are the real issues here? And if we have real issues as
22 opposed to issues, Judge, that are self-made, perhaps for the
23 purpose of trying to as the -- which is the overarching driver
24 of the committee, the committee makes no bones about the fact,
25 Judge, that regardless of discovery, they want the RMB -- the

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

30

1 hearing on the 9019 motion for the RMBS settlement moved back
2 to after the examiner issues his report.

3 THE COURT: Well, let me -- I want to stop you there
4 for this reason, and this carries over on the issues about
5 extension of exclusivity, this case is not on hold. This is
6 more directed to the committee and others but also to the
7 debtors, this case is not on hold awaiting an examiner's
8 report. The examiner's report is important. There are serious
9 issues that the examiner is looking at. The examiner will
10 issue a report, if the examiner identifies issues or potential
11 causes of action or whatever it is or not. It will not resolve
12 how this case -- how this case should be resolved. There is no
13 reason in my view to say we have to wait until the examiner's
14 report to negotiate a plan. There may be important issues that
15 can't be finally -- fully and finally settled, but you know
16 what the issues are. You know what -- I mean you all
17 cooperated; there was no substantial disagreement, I'm not
18 aware of any disagreement about what the scope of the
19 examiner's investigation was to be. You all know what
20 transactions are going to be the focus of the examiner's
21 report. You all have sort of staked out some positions already
22 about whether you think they were improper transfers or what
23 have you. Uncertainty is usually what leads to negotiation and
24 resolution. And maybe you can't dot the i's and cross the t's
25 until the examiner's report. This case is not sitting on hold

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

31

1 until there's an examiner's report, okay.

2 So I'm -- look, you've made a lot of progress in the
3 case so far, in my view. There have been a lot of issues
4 you've dealt with. You've dealt with the debtors, dealt with
5 effectively, you're conducting business in a difficult
6 environment, you've got litigation pending everywhere. Some --
7 a lot of it where one of the debtors is a plaintiff and some
8 where they're defendants and where -- even nondebtor affiliates
9 are defendants and all. It's -- I don't underestimate the task
10 that everybody on your side of the table is facing, okay. But
11 we're not putting this case on hold for an examiner's report
12 that at the end of the day isn't really going to resolve that
13 much because he'll issue a report, and if he finds some
14 questionable transactions, then you're still going to be
15 arguing about it. You'll disagree with it, the committee will
16 think he didn't find enough bad things happen, and you're still
17 going to be left to negotiate. So you ought to be negotiating
18 effectively now.

19 I don't -- I understand the importance of the RMBS
20 settlement and I think -- I commented, when I approved the
21 schedule, it wasn't just a schedule. There was a lot of
22 substance in it. It was important to the debtor. The RMBS
23 trustees, I think, agreed to important points from the debtors'
24 standpoint and their own standpoint. Whether the settlement's
25 going to work in the end, I don't know. But we'll find that

RESIDENTIAL CAPITAL, LLC, ET AL.

32

1 out. But you're not going to get to that point.

2 Here's what we're going to do, I don't want to
3 spend -- I want to give -- if you have some last points on the
4 RMBS status you want to talk about it, I'll let you do that.
5 We're going to have a separate conference to deal with the
6 discovery issues.

7 MR. PRINCI: Okay.

8 THE COURT: And I don't want to -- I've reacted
9 strongly to what on the one hand you file a status report and
10 say everything's hunky-dory with respect to discovery and they
11 file a sta -- if I see a bunch of status reports saying, no,
12 no, no, no, no. So I want to move forward with the agenda. If
13 there's some last points you want to make, we'll do that. But
14 the message, I think, I got across pretty clearly is if it
15 doesn't happen on November 5th, it probably isn't happening
16 until sometime in January. So you better go through backflips
17 if you want to keep to the schedule.

18 MR. PRINCI: Your Honor, we will move Mother Earth to
19 keep that schedule, and I appreciate Your Honor allowing us the
20 time to first try to address this with the committee, and,
21 then, we can bring to the Court, as Your Honor sees fit,
22 whatever real discovery disputes there are. And I emphasize
23 the word "real", Judge, because, again, the committee is taking
24 a position that goes beyond that and I want to address that
25 which is --

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

33

1 THE COURT: Well, some of what the committee -- let me
2 just -- I mean, some of what the committee says is -- they say
3 there's no disagreement about producing 1,500 loan files.
4 Their gripe is you haven't done it.

5 MR. PRINCI: Judge, let -- again, I hesitate because
6 once you start talking about the discovery --

7 THE COURT: Okay. We'll do it in a separate --

8 MR. PRINCI: -- you get into their --

9 THE COURT: -- we're going to have a separate -- when
10 a -- yes, you are going to meet and confer and see what's real
11 and what's not but if I can get my computer to work, which I'm
12 having trouble with here, I'm going to have you come in for a
13 conference next week --

14 MR. PRINCI: Okay.

15 THE COURT: -- where the only thing we're going to
16 talk about is the status of discovery.

17 MR. PRINCI: That'd be terrific, Judge.

18 THE COURT: Okay.

19 MR. PRINCI: By the way, just a footnote since you
20 raised it, I'm not trying to get the last word on you but out
21 of the --

22 THE COURT: Don't worry; Mr. Eckstein hasn't even got
23 a chance to speak yet so you're not getting the last word.

24 MR. PRINCI: -- out of the 1,500 loan files we --

25 THE COURT: Or Mr. Mannal; I don't know which one of

RESIDENTIAL CAPITAL, LLC, ET AL.

34

1 you is going to get the honors here.

2 Go ahead, Mr. Princi.

3 MR. PRINCI: -- out of the 1,500 loan files requested,
4 they have 1,462 as of today, I'm informed.

5 In any event, Judge, let me get to the other points of
6 the status report. Let me address the Holdco election.

7 First let me explain to the Court how that evolved and
8 let me explain to you why we are now, in light of the
9 objections that we got from certain parties, in the process of
10 removing it.

11 THE COURT: Can I -- I don't want to interrupt for
12 this.

13 MR. PRINCI: Please.

14 THE COURT: The history is undoubtedly fascinating how
15 it got in there --

16 MR. PRINCI: It's really not.

17 THE COURT: -- and whether it comes out of there. I'm
18 more interested in what it's going to be at the end of the day.

19 MR. PRINCI: Okay.

20 THE COURT: Okay?

21 MR. PRINCI: So the Holdco election, Judge, simply
22 put, addressed the institutional investors' claim vis-a-vis the
23 parent debtor company, ResCap LLC. ResCap LLC is a holding
24 company. And ResCap LLC is not involved in the sale because
25 ResCap LLC isn't an operating company. It doesn't have any of

RESIDENTIAL CAPITAL, LLC, ET AL.

35

1 the servicing rights, et cetera. So there was a dispute after
2 we left court here on July 30th, which was, I think, the last
3 time -- there was a dispute as to the settlement agreement and
4 how it related to ResCap LLC --

5 THE COURT: I think you're telling me more than I
6 really want to know.

7 MR. PRINCI: -- and where we are today is that we are
8 intending, Judge, I think, right now to remove it which will
9 mean that -- remove it and remove -- so it will be removed, the
10 release related to LLC will be removed and where does that
11 leave the parties? Well, that leaves the parties free to --
12 free to address the alter ego claim, which is what it's based
13 on, at another date. That is what I believe Wilmington, which
14 is the noteholders, the ad hoc group of noteholders --

15 THE COURT: Mr. Moloney's client.

16 MR. PRINCI: Right. Right. And so I think that was
17 their big claim.

18 What we have done -- or what we haven't done yet --
19 what we're intending to do, what we're working on is still work
20 in progress, but we're hoping, Judge --

21 THE COURT: When is this work in progress going to be
22 completed? I'm more interested in that than what you're doing.

23 MR. PRINCI: I thought it was going to be today so I'm
24 off on my -- I'm off on my estimates. I am certainly hopeful
25 it will be the end of this week, Judge.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 36

2 So -- and I think that the problem with addressing it
3 now, as you can see, Judge, is it is certainly a moving target
4 and that I'm uncomfortable because -- it's --

5 THE COURT: That's why I don't want to get down in the
6 weeds.

7 MR. PRINCI: All right.

8 THE COURT: If it's a moving target, I don't want to
9 spend a lot of time --

10 MR. PRINCI: Fair enough. Fair enough. So we'll
11 address that, Judge. I think with respect to discovery issues,
12 we'll welcome MBIA to the party because they love discovery.
13 And so we'll have them in our offices to discuss that and we'll
14 bring anybody who wants to talk about discovery into our
15 offices. We'll listen to the Court with respect to when you
16 can give us a date to resolve anything we can't resolve with
17 these folks.

18 THE COURT: Well, whether -- I'm going to give you a
19 date whether you've got it resolved or not. We're having --
20 we're going to have another -- we're going to have a session;
21 just going to talk about discovery, disputes or not disputes.

22 MR. PRINCI: Judge, I'll see --

23 THE COURT: Can I ask you another question?

24 MR. PRINCI: Please.

25 THE COURT: I should know the answer to it and I
 don't.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 37

2 This afternoon we have the FHFA. That's a securities
3 case, right? Are there representation and warranty claims in
4 that case, too? I see one of your colleagues saying no.
5 Shaking her head no.

6 MS. PATRICK: Your Honor --

7 THE COURT: Can you come up.

8 MS. PATRICK: -- I'll come up and help you.

9 THE COURT: Identify yourself for the record.

10 MS. PATRICK: Your Honor, Kathy Patrick. I represent
11 the steering committee group of investors and out of everybody
12 in this room other than, perhaps, Mr. Lipps for the debtor, I'm
13 closest to these repurchase claims.

14 FHFA, as the conservator for Fannie and Freddie, has
15 two kinds of repurchase claims. They have repurchase claims
16 that adhere to their -- what's called their guarantee portfolio
17 where they buy loans from the originators and guarantee them as
18 to principal in the event of a default. That's one channel of
19 repurchase claims.

20 They have a separate channel of repurchase claims that
21 is part of the RMBS trust settlement. They are holders of RMBS
22 that are embodied in the settlement. But the litigation that
23 is before you today, the conference this afternoon, does not
24 include any repurchase claims at all. It is a pure securities
25 case.

26 THE COURT: Okay. And so if the RMBS settlement is

RESIDENTIAL CAPITAL, LLC, ET AL.

38

1 approved --

2 MS. PATRICK: Yes, sir.

3 THE COURT: -- and all of the trustees act in
4 accordance with the instruction they've received from --

5 MS. PATRICK: Ninety percent of the holders already.

6 THE COURT: Well, I won't get into what classes and
7 all that, but let's just assume for purposes of discussion that
8 the RMBS trustees act -- sign onto the settlement.

9 MS. PATRICK: Yes, sir.

10 THE COURT: Adhere to it. Will it resolve any of the
11 claims of FHFA?

12 MS. PATRICK: It will resolve claims related to -- so
13 that -- the repurchase claims belong to the trusts not to FHFA.

14 THE COURT: Yes.

15 MS. PATRICK: Right? So it will take all of those
16 trust claims off the table. FHFA's guarantee portfolio is not
17 resolved by the RMBS settlement, but to the extent Fannie and
18 Freddie have a controlling interest in any trust and that trust
19 accepts the settlement, those claims go away.

20 THE COURT: And is that true of FDIC because there's
21 the motion to withdraw the reference; FDIC is a receiver for --
22 I don't know which institution -- that's before Judge Swain.
23 What is their --

24 MS. PATRICK: Any holder in any RM -- sir, what I'm
25 talking about are what are called private label

RESIDENTIAL CAPITAL, LLC, ET AL.

39

1 securitizations.

2 THE COURT: Yes. Um-hum.

3 MS. PATRICK: Any PLS repurchase claim for the 392
4 trusts resolved in the settlement is resolved. It doesn't
5 matter who the certificate holders are. If the trustees for
6 that trust accept the settlement and the order is entered by
7 the Court, a gigantic swath of repurchase claims will be put to
8 bed; potentially, twenty-two or more billion dollars.

9 THE COURT: And the -- just focusing on the FHFA
10 case --

11 MS. PATRICK: Um-hum.

12 THE COURT: -- the non-Ally underwriters, okay --

13 MS. PATRICK: Yes, sir.

14 THE COURT: -- who've -- they've all filed regarding
15 discovery.

16 MS. PATRICK: Um-hum.

17 THE COURT: All right. They say they have indemnity
18 claims against ResCap and AFI.

19 MS. PATRICK: Um-hum.

20 THE COURT: Will any of the indemnity claims likewise
21 be resolved or not?

22 MS. PATRICK: No. Their indemnity claims arise under
23 underwriting agreements in connection with the offering --

24 THE COURT: Securities.

25 MS. PATRICK: -- of the securities.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

40

1 THE COURT: Okay.

2 MS. PATRICK: So I'm not a bankruptcy lawyer but I
3 think your safe haven, there, Judge, is 503(b).

4 THE COURT: I'm --

5 MS. PATRICK: They tell --

6 THE COURT: We'll deal with that.

7 MS. PATRICK: Yes.

8 THE COURT: I just -- when I started putting these
9 pieces together, it wasn't clear to me, what, if anything, will
10 be resolved with respect to the federal regulators in their
11 capacities as conservators or receivers or what have you.

12 MS. PATRICK: Right.

13 THE COURT: And of the other parties to that
14 litigation that asserted indemnity claims --

15 MS. PATRICK: Right.

16 THE COURT: -- or they haven't yet but will.

17 MS. PATRICK: Correct. And as conservators and
18 receivers on the PLS side, the FHFA, Fannie and Freddie, don't
19 own those claims. They still belong to the trust. They're not
20 assets of the GSEs.

21 THE COURT: Okay.

22 MS. PATRICK: The securities they hold are assets of
23 the GSEs.

24 THE COURT: Okay. All right. Thank you very much.

25 MS. PATRICK: Thank you, Your Honor.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

41

1 THE COURT: I appreciate it.

2 Mr. Princi, go ahead.

3 MR. PRINCI: Thank you, Judge.

4 Judge, let me just -- I realize other parties want to
5 speak but there's two -- there's two points in the committee's
6 response that can't go unanswered.

7 One, Judge, is the --

8 THE COURT: They probably could, but go ahead.

9 MR. PRINCI: Well, since you're indulging me I'm going
10 to get it in before you cut me off.

11 So footnote 4, Judge, basically, what footnote 4 says
12 is look, there's no reason why the Court can't put off
13 discovery -- not discovery -- the hearing date and we'll still
14 be okay because we got these other provisions that give us the
15 substantive rights. And, Judge, I don't want to get into what
16 was negotiated and what the understanding was when we were,
17 and, obviously, the committee's counsel was there when we were
18 negotiating with the other parties but I certainly did not view
19 that as what the understanding was. And I've contacted the
20 institutional investors and I understand that that is -- that's
21 certainly not their position. And, again, we don't want to
22 lose what we negotiated hard for.

23 The other point, Judge --

24 THE COURT: I guess maybe you -- I sound like a broken
25 record at this point. You still have your November 5th date.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

42

1 I'm more concerned -- I said it before, I'm more concerned
2 about them having a full and fair opportunity to prepare and be
3 able to put on whatever case they wish to put on. The November
4 5th date may be precarious but it still is holding. So I think
5 your --

6 MR. PRINCI: Understood. Judge, trust me when I say
7 this: we hear you loud and clear on this.

8 One last point, Judge, and I do, unfortunately, have
9 to make a response to.

10 In paragraph 12 of the committee's response, there's
11 an unfortunate statement, it's untrue and we have to respond,
12 Judge. It says flatly, "The settlement," this being the RMBS
13 settlement, "The settlement was negotiated by debtors with
14 little motivation to protect creditors by limiting the
15 settlement number and with every motivation to lock in the RMBS
16 investors' support for the debtors' pre-negotiated plan
17 providing Ally with a global release of the state and third-
18 party claims." That's just terribly unfortunate, Judge. It is
19 vehemently denied by the debtor and that sort of thing's
20 unnecessary. And that's it for now, Judge. Thank you.

21 THE COURT: Well, when we get to the motion to --
22 well, let me -- I'll get to that later.

23 Go ahead, Mr. Eckstein. Or I don't know which of your
24 colleagues is --

25 MR. PRINCI: Judge, I guess I'll wait for the

RESIDENTIAL CAPITAL, LLC, ET AL.

1 conclusion when you give us a date for the discovery
2 conference?

3 THE COURT: Yes.

4 MR. PRINCI: Okay.

5 THE COURT: If I can ever get my computer working.

6 MR. ECKSTEIN: Your Honor, good morning. Kenneth
7 Eckstein of Kramer Levin on behalf of the official creditors'
8 committee.

9 I did come prepared today with a fairly lengthy status
10 report. It seems as if Your Honor, at the moment, is focused
11 primarily on discovery so let me start with the discovery.

12 I heard Mr. Princi say at one point that what the
13 committee said was fundamentally incorrect. I didn't hear him
14 then go on and explain how it was fundamentally incorrect. The
15 facts of the matter are is this. In connection with the dates
16 that were put in place in July where we all recognized and the
17 Court recognized that these dates were ambitious at best and
18 these dates probably did not provide the parties with any real
19 opportunity to both deliberate and then confer and negotiate
20 over potential resolutions of issues to narrow --

21 THE COURT: I don't think I ever said that.

22 MR. ECKSTEIN: Well, I'm certainly willing to say
23 that, Your Honor. Because I don't believe --

24 THE COURT: You may feel that's your position --

25 MR. ECKSTEIN: I don't believe --

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

44

1 THE COURT: -- but that's not a position that I took.

2 MR. ECKSTEIN: -- I don't believe that the schedule
3 does provide that. But be that as it may, the schedule
4 included, at the debtors' urging, that all discovery would be
5 responded to in ten days and that's fast. And we understood
6 that that was fast but that was part of the way in which this
7 schedule was going to be met.

8 I understand because I speak to Mr. Lee and the
9 colleagues at Morrison & Foerster more than once a day. There
10 is no lack of communication with us. And the fact of the
11 matter is we've been working intensely with Mr. Princi and Ms.
12 Levitt about this and my colleagues and they have been working
13 in good faith intensely for the last several weeks, it seems on
14 a daily basis, if not more, to try to deal with this. So we're
15 not suggesting bad faith. That's not -- I'm not accusing the
16 debtor of not acting properly.

17 The fact of the matter is that as of this morning when
18 we walked into court, we had asked on August 17th for a sample
19 of 1,500 loan files and we had 900 files this morning. If
20 somehow magically a bunch of files showed up in our office
21 today, I don't know about that, but as of this morning, 900 of
22 1,500 were present. Now, that is twenty to twenty-five days
23 after the request was made.

24 I understand it's difficult, but the fact of the
25 matter is it's late and I have to now figure out what to do

RESIDENTIAL CAPITAL, LLC, ET AL.

45

1 with it.

2 THE COURT: So somebody this afternoon wants 43,000
3 loan files. So --

4 MR. ECKSTEIN: Your Honor, like it or not, I think we
5 have a responsibility here and somebody is going to have to lay
6 out the facts and circumstances surrounding this settlement,
7 which is historic and which is going to have significance
8 around the country in RMBS litigation and very significant
9 decisions are going to have to be made about whether or not
10 it's appropriate to approve an 8.7 billion dollar settlement.
11 That's a big settlement. And I would imagine it needs to be
12 done rigorously. And we believed that the foundation for doing
13 that, among other things, was making sure that we had a
14 reasonable sample.

15 This is not a very substantial sample as samples go.
16 This is about as narrow as we could come up with. But in order
17 for us to make a proper evaluation of this settlement, we need
18 to see the sample. Our experts need to see the sample. And we
19 need an opportunity to evaluate it. And the fact of the matter
20 is, it is fifteen to twenty days late right now. I can't
21 change that fact. And I believe that's -- that's a fact on the
22 ground and we're dealing with that right now.

23 Number two, we have a September 24th fact discovery
24 cutoff. That's two weeks from today minus a day. The debtor
25 simply has not responded to fact discovery relating to the

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

46

1 facts and circumstances surrounding the settlement. And there
2 is similar discovery that is out to AFI, there is similar
3 discovery out to the Patrick group, there is similar discovery
4 out to Talcott Franklin. We have not gotten responses to that
5 discovery, period. We don't know who negotiated the
6 settlement. We don't know who to depose. It is simply not
7 possible -- it is simply not possible to comply with a
8 September 24th deadline if we haven't gotten documents.

9 I've been saying this before in this case, documents
10 do not mean loading us up with truckloads of contracts.
11 Documents mean e-mails. And until we start getting e-mails in
12 this case, frankly, the discovery is a waste of our time. And
13 I'm -- I've been through that before, Your Honor. And every
14 time we have a motion, I say until the e-mails come out,
15 frankly, to tell me that they produced 25,000 pages of
16 documents is not meaningful. These contracts are long. And so
17 when the e-mails come out, we will have gotten the discovery.
18 That is not out today. And --

19 THE COURT: Have they told you when you're going to
20 get them?

21 MR. ECKSTEIN: No. I'm told maybe in two weeks. And
22 in all due respect, what Mr. Princi did not tell you, there's a
23 dispute about whether we're going to get any of the relevant
24 information because I'm told the facts and the circumstances
25 surrounding the settlement are not relevant or appropriate, and

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

47

1 number two, they're subject to a common interest privilege.

2 Now, we can do it next week or we can do it today but
3 I know the law on that as well as anybody else. I do not
4 believe that they are inappropriate; I do not believe that
5 they're subject to the common interest privilege. The debtor
6 and the Patrick group are adverse parties and the common
7 interest privilege will not apply, in my view, at least, to
8 those negotiations. And we can do it next week, I'm happy to
9 do it, but it's going to further delay the discovery.

10 THE COURT: All right. I suggest you all look at the
11 order I entered in and adversary proceeding entitled Velo
12 Holdings, Inc. v. Paymentech LLC. The case number is 12-01564
13 and the order is ECF Docket Number 14. And it was in the
14 context of an injunction hearing but where a party failed to
15 produce all of the electronic discovery that the other side
16 needed to prepare for trial. You can look at it. In Velo, I
17 also wrote recently as a published opinion on common interest
18 privilege.

19 We're going to have our conference. I want to see the
20 parties to this dispute next Wednesday the 19th at 10 a.m.
21 I've spent as much time on this as I'm going to now. Okay.
22 You can all -- look, if you're going to fight about common
23 interest privilege, come fight about common interest privilege.

24 You're all risking -- the longer you take to
25 resolve -- I'll resolve these issues pretty quickly if they're

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

48

1 presented to me. So I don't want to hear that you've been
2 talking for weeks about there's a common interest objection and
3 as a result they haven't produced any -- they haven't produced
4 any documents. You'll get it resolved pretty quickly.

5 I will see you on the discovery dispute next Wednesday
6 the 19th at 10 a.m.

7 MR. ECKSTEIN: Your Honor, I'm happy to come back and
8 defer but it's obvious that the discovery deadline is expiring
9 and we'll, obviously, have to deal with that next week but
10 we're not in a position to meet the discovery responsibilities
11 given where the facts stand today, and I respectfully do not
12 believe it is possible for us to meet those deadlines given
13 where the facts stand.

14 THE COURT: And, you know, every case is different --

15 MR. ECKSTEIN: And this is not a question of bad
16 faith.

17 THE COURT: -- but go look at the order I entered in
18 that Paymentech adversary procedure.

19 MR. ECKSTEIN: I've looked at it, Your Honor.

20 THE COURT: And that's -- I told Mr. Princi the
21 November 5th date is hanging by a thread and if it doesn't
22 happen then, see you next year. Okay? I'm not -- it's not an
23 empty threat. I mean it's -- I've got fully paid-for tickets
24 to be out of the country and I've got a full docket before and
25 I arranged those dates after these dates were all set and was

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

49

1 assured that you'd all be ready to go. Fine. Okay?

2 Anything else, Mr. Eckstein?

3 MR. ECKSTEIN: I actually -- at some point, I think
4 there's a lot to say about what the issues are going to be and
5 how they're presented, but I can do that some other time, Your
6 Honor. I think that there are substantive issues at some point
7 in time once we get past discovery, there are very important
8 substantive issues that I don't think have really been
9 discussed at any point in time in this case that are going to
10 go to the substance and the merits of the RMBS settlement, and
11 how we're going to address those, I believe, would warrant a
12 discussion before objections are filed. And I'm happy to put
13 that off to another day but I thought that it was
14 appropriate --

15 THE COURT: Well, I'll tell you what.

16 MR. ECKSTEIN: -- to discuss them now.

17 THE COURT: You can all discuss that next Wednesday.
18 I don't have anything on the calendar in the morning. I've got
19 an afternoon calendar. Both sides can come prepared to tell me
20 what they think the issues in this RMBS settlement hearing are
21 and how the discovery relates to it and why you think it's
22 essential that you get all of your discovery, and we'll cover
23 it then. Okay?

24 MR. ECKSTEIN: I think that's fine.

25 THE COURT: You'll get your chance then.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

2 MR. ECKSTEIN: That's fine, Your Honor.

3 THE COURT: Okay.

4 MR. ECKSTEIN: I mean I'm happy to come back next
Wednesday. I'm sure --

5 THE COURT: It'll be after your holiday.

6 MR. ECKSTEIN: Fortunately, I'm prepared today so I
7 won't have to --

8 THE COURT: You'll be feeling good after the new year,
9 you'll come in and you'll --

10 MR. ECKSTEIN: It probably will be in a very, very
11 good tone. We'll resume next Wednesday, Your Honor.

12 THE COURT: All right. What's next? Mr. Lee? We
13 don't need another word on this, Mr. Princi.

14 MR. PRINCI: Then --

15 THE COURT: We don't need another word on this.

16 MR. PRINCI: -- you won't get one.

17 MR. LEE: Your Honor, if I may, I'm just going to
18 change the schedule up slightly so we can go to an uncontested
19 matter --

20 THE COURT: Go ahead.

21 MR. LEE: -- which was heavily contested.

22 Your Honor, the next item on the agenda is the
23 presentment of the stipulation and proposed order regarding
24 subservicing.

25 THE COURT: And the objection deadline is past. There

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

51

1 were no objections that were filed. Is there anybody here who
2 thinks they should be permitted to speak to the proposed
3 stipulation?

4 MR. ECKSTEIN: I have a brief comment I would like to
5 make, Your Honor.

6 THE COURT: Okay. You want to say something first,

7 Mr. --

8 MR. LEE: Maybe I should reserve --

9 THE COURT: Mr. Lee, go ahead.

10 MR. LEE: Maybe, Your Honor, I should reserve thanking
11 everybody for their hard work on this until after I hear Mr.
12 Eckstein speak?

13 THE COURT: Well, I thought that the statements that
14 were submitted in connection with the stipulation were
15 interesting, but nevertheless the stipulation was agreed to and
16 it reserves the rights that it reserves and it does what it
17 does and I've read it all.

18 MR. LEE: Okay.

19 THE COURT: You can --

20 MR. LEE: I will be --

21 THE COURT: I'll give you a chance to briefly respond.
22 Mr. Eckstein?

23 UNIDENTIFIED SPEAKER: Thank you, Your Honor. With
24 apologizes; I need to excuse myself.

25 THE COURT: You're excused. Go ahead.

RESIDENTIAL CAPITAL, LLC, ET AL.

1 MR. ECKSTEIN: Your Honor, I'm happy to -- I'm happy
2 to rely on the statement --

3 THE COURT: I've read your statement.

4 MR. ECKSTEIN: -- and it's fine.

5 THE COURT: Interesting reading.

6 MR. ECKSTEIN: It was an interesting subject. The
7 point that I'm rising to make is because one of the concerns we
8 had about this was how it was presented and when it was
9 presented and disclosure and the like, there is another motion
10 that is on, and, again, Your Honor will hear that motion but
11 there is a motion that was filed on Thursday after the
12 statements were filed to authorize the debtor to retain
13 Pricewaterhouse in connection with a federal reserve board
14 settlement that now turns out dwarfs the dollars in the
15 subservicing agreement.

16 THE COURT: I'm sorry; say that again.

17 MR. ECKSTEIN: Dwarfs the dollars in the subservicing
18 motion. The amount of -- the amount of money that we're
19 talking about in that motion is projected to now be in excess
20 of 250 million dollars of payments by the debtor in connection
21 with the pre-petition contract that has many of the earmarks of
22 the subservicing arrangement. So I merely rose to alert Your
23 Honor to the fact that --

24 THE COURT: I can't wait.

25 MR. ECKSTEIN: -- there is another motion that got

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

53

1 filed Thursday that has a lot of similarities, and I didn't
2 want Your Honor to feel that somehow we have totally put this
3 behind us, but for better or for worse, we have another round
4 that may be coming up. So while this settlement is fine and
5 we're satisfied with it, I just wanted to alert Your Honor to
6 the fact that we may have to, sort of, raise some of these
7 issues a second time and we'll deal with that, I think, over
8 the next couple of weeks.

9 THE COURT: Okay. Thank you. All right. The
10 stipulation is approved.

11 MR. LEE: Thank you, Your Honor. I just wanted to
12 note for the record that in relation to the PwC retention
13 application that the details and circumstances --

14 THE COURT: Just speak up a little bit.

15 MR. LEE: Sorry -- the details and circumstances
16 giving rise to the consent order was entered into as a result
17 of negotiations with a number of regulatory authorities as
18 contained in the original Whitlinger affidavit, and it was
19 certainly a settlement that was entered into after careful
20 consideration of the alternatives. It's a fairly detailed
21 negotiation. And I just wanted to note, Your Honor, that the
22 company needs to honor the obligations to which it committed
23 itself and we understand and respect the views regarding the
24 cost of that review and that it might, indeed, exceed by some
25 significant amount the actual amount of relief provided to

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**
2 consumers. But nonetheless, we're required, as a regulated
3 entity, to comply. A commitment is a commitment and I just
4 wanted to make that clear for the record and we needed to do
so, Your Honor.

5 THE COURT: Okay. Thank you.

6 MR. LEE: Thank you.

7 THE COURT: What's next on the agenda?

8 MR. LEE: Your Honor, next is the motion to extend
9 exclusivity. I'll turn it over to Mr. Marinuzzi, if I may.

10 THE COURT: Sure.

11 MR. MARINUZZI: Good morning, Your Honor.

12 I don't know about Your Honor, but I'm having fun
13 today.

14 Your Honor, I'll try not to make Your Honor repeat
15 himself. We heard you loud and clear in connection with the
16 status conference.

17 THE COURT: I think you got the drift of what I'm
18 thinking.

19 MR. MARINUZZI: The subtlety was noted.

20 Your Honor, we filed a motion seeking a nine-month
21 extension of our exclusive filing and solicitation periods
22 which would have taken the filing deadline to June 11th and the
23 solicitation period to August 10th.

24 We received four limited objections, all of which
25 agree that some extension is appropriate, three of which

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

55

1 believe an extension measured from the time that the examiner
2 files his report is an appropriate one that request a -- or
3 agrees that an extension is appropriate but not one that takes
4 us beyond, effectively, the closing of the sale hearing.

5 So Your Honor, to start, the basis of the request was
6 really to allow the debtors and all parties-in-interest to have
7 a very keen interest in the examiner's report to deal with all
8 of the Ally issues that we're dealing with from start to
9 finish. And we recognize, as Your Honor noted, there are other
10 things that we can and should be dealing with including the
11 plan process. And we've committed in our motion and continue
12 to confirm that we will consult with these parties on what an
13 appropriate plan should look like.

14 THE COURT: Well, let me ask you this, Mr. Marinuzzi.

15 MR. MARINUZZI: Sure.

16 THE COURT: There are -- there is a list of
17 objections, if you will, to the extension of exclusivity
18 whether they're objections, per se. Everybody agrees there
19 ought to be some extension.

20 MR. MARINUZZI: That's correct. There were four
21 responses, Your Honor.

22 THE COURT: But Aurelius, Wilmington Trust, ad hoc
23 group of junior secured noteholders, the official committee and
24 I think they pretty well all take the position that the debtor
25 has refused to engage in substantive plan negotiations to this

RESIDENTIAL CAPITAL, LLC, ET AL.

56

1 point.

2 MR. MARINUZZI: Your Honor, they all say that.

3 THE COURT: Is that true?

4 MR. MARINUZZI: I don't believe that's true, Your
5 Honor, and let me explain why. First of all, Your Honor, the
6 junior secured noteholders withdrew their objection before the
7 start of the hearing so that's one less to deal with. They've
8 agreed with our proposal.

9 I think, Your Honor, what we're doing on, effectively,
10 a daily basis with the committee is dealing with lots of issues
11 that are relevant to the plan process and we have not sat
12 down --

13 THE COURT: If you take that position, everything is
14 relevant to the plan process but I mean -- but go ahead, Mr.
15 Marinuzzi.

16 MR. MARINUZZI: There are a lot of contingencies, Your
17 Honor, important contingencies, that really have to be
18 addressed that are going to shape what a plan looks like. We
19 spent a lot of time talking about one of them and that's the
20 8.7 billion dollar settlement. And so to formulate a plan in
21 the absence of knowing whether the Court approves that
22 settlement or not, when people are looking at value and where
23 value flows and where it lies, means that we're going to just
24 have to start over again by tweaking things. Now, that's not
25 to say that we can't have discussions that have what I guess

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

57

1 maybe collars on value but we have to be very creative because
2 until things like the examiner decides that either there's
3 enough claims that are found that have value, that belong to
4 these particular debtor entities, that satisfies the committee
5 or satisfies Wilmington Trust that controls the notes issued
6 out of Holdco or finds that everything that the company did was
7 appropriate because of the way the claims lie and the damages
8 or lack of damages or the consideration provided, we -- that is
9 going to, without a question, change whatever agreements we
10 come to between now and the time that report's issued. So it's
11 not as if we're not doing anything.

12 And, yes, it's true; when it comes to sitting down
13 with a particular document and saying this is what the plan
14 should look like, we want your comments Wilmington Trust, the
15 junior secureds, the committee, it's true; we have not sat down
16 to have that discussion.

17 THE COURT: But what they -- what I take away from the
18 objections is that pre-petition AFI determined what plan they
19 wanted to propose effectively and you went out -- I'm not
20 saying this is what happened; this is the gist of what I take
21 away -- you went out and you negotiated the RMBS settlement,
22 that was a major component of it, and that they essentially say
23 the debtors been unwilling to negotiate off of what AFI
24 dictated. Okay. That's the position I'm taking.

25 MR. MARINUZZI: Okay. And let me respond to that,

RESIDENTIAL CAPITAL, LLC, ET AL.

58

1 Your Honor.

2 First of all, I think in making that assumption, you
3 lose sight of the fundamental issue that the company had to
4 deal with before they filed for bankruptcy. And so what the
5 company thought of was let's look at the other mortgage
6 servicing origination companies that filed for bankruptcy and
7 what happened to them. They all liquidated. Scrap metal
8 value; creditors got very little recovery.

9 And the company said, well, we want to do things
10 differently and we want to make sure we go into bankruptcy with
11 the support to continue operating our business, with a platform
12 that's sustainable to realize real value for creditors
13 including those creditors represented by the committee.

14 And so the committee -- I'm sorry -- the company at
15 that point determined we have to find a way to solidify our
16 financing, to obtain financing, and they did so --
17 unprecedented for this kind of a business -- one-and-a-half
18 billion dollars of financing, cash collateral usage, and
19 stalking horse purchase agreements from two bidders proposing
20 to pay nearly four billion dollars in value. Now, that didn't
21 happen by accident. And if you look at the history of
22 companies in this sector, it never happened before. And why
23 did it happen? Well, it happened because the debtors
24 determined that the AFI relationship was one they had to live
25 with for better or worse, parent subsidiary. And while the

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

59

1 relationship has been strained and had been strained prior to
2 bankruptcy -- and nobody likes to talk about that and you'd
3 have a different perception if you only read the committee's
4 papers -- but AFI, whether we like it or not, agreed to do a
5 number of things that were necessary to give this company a
6 soft landing. And the examiner's going to have the last word
7 on AFI. We accept that.

8 THE COURT: The examiner's not going to have the last
9 word on anything.

10 MR. MARINUZZI: Your Honor, I apologize.

11 THE COURT: That's the point, Mr. Marinuzzi. Because
12 whatever the examiner decides, there will be various
13 stakeholders who disagree, believe that there are transactions
14 he didn't identify as giving rise to potential claims or claims
15 that he did identify that the debtors or AFI disagree. So it
16 is not the last word. Uncertainty is what causes negotiation.
17 It's another data point, an important data point, obviously,
18 but not the determinative factor.

19 MR. MARINUZZI: Fair point, Your Honor. Fair point.

20 So what did AFI do? They agreed to serve as the
21 stalking bidder for the debtors' whole loan portfolio. They
22 agreed to provide debtor-in-possession financing. They agreed
23 to support the debtors' continued origination of mortgage loans
24 in bankruptcy. They agreed to continue through a shared
25 services agreement to allow the debtors to continue to utilize

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

60

1 back office support, payment systems and other internal systems
2 established by the parent to operate the debtors' businesses.

3 They're working with the debtors right now to assist
4 in separating those services to allow for a seamless sale of
5 the platform.

6 Has everything with AFI gone smoothly? Of course not.
7 Your Honor has seen it; Your Honor will continue to see it.

8 THE COURT: And they're acting as an eleemosynary
9 institution and all their asking for is the third-party
10 nondebtor releases --

11 MR. MARINUZZI: Your Honor, whether --

12 THE COURT: -- to get out from under all their
13 liabilities.

14 MR. MARINUZZI: -- whether it's motivated by
15 selfishness or selflessness, the point that I'm trying to make
16 so it's not lost is that the company had --

17 THE COURT: Okay. The company -- I have, what, fifty-
18 three debtors. I don't know if that's the right number; it's
19 approximately the right number.

20 MR. MARINUZZI: Fifty-one, I believe.

21 THE COURT: Fifty-one? I've got fifty-one debtors.
22 That's what's before me. Okay. The debtors have to move
23 forward with a plan process.

24 AFI is an important stakeholder, an important party to
25 this. I don't underestimate their importance now, in the past,

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

61

1 in the future to getting this through as a successful case.
2 But it's the debtors that are before me. It's the debtors who
3 have exclusivity and must propose a plan unless and until
4 exclusivity is lifted.

5 Judge Gerber, in Adelphia Communications, 352 B.R. 578
6 (Bankr. S.D.N.Y 2006), identifies nine nonexclusive factors
7 that courts should examine in determining whether to extend
8 exclusivity. I've applied those factors in the Borders case, I
9 applied those factors in a case called Lexington Precision,
10 I've applied the factors in other cases. Among the factors
11 that the court, that Judge Gerber focused on was whether the
12 debtor has made progress in negotiations with its creditors.
13 It's not the only factor but it's one of many. There are
14 others, I think, that bear on where we are today, but it's an
15 important factor. And what I'm concerned about is that you
16 point to the uncertainties, some of which will hopefully --
17 will be resolved along the way if the sales of the loan
18 platform and the legacy loan portfolio are approved, it'll be a
19 major milestone. I don't underestimate that. You can
20 certainly proceed on the assumption that those sales will take
21 place and will close and the proceeds that they'll generate as
22 a basis for moving forward with plan negotiations now, not
23 sometime next year, now.

24 What I'm concerned about is -- it's very easy for all
25 of you to point to the uncertainties and ambiguities and

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

62

1 everything else about this case; the case is not going to sit
2 here and wait for those to clarify. Because at the end of the
3 day, I have a feeling it will be -- they won't be clarified
4 sufficiently; particularly, the examiner. I mean it's an
5 important -- it's important in this case; I don't underestimate
6 it. And it will probably change the dynamics of the
7 negotiation, shifting it one way or the -- one side or the
8 other but not -- I'll be surprised whether that's -- the big --
9 the event that's going to determine everything about this case.
10 Just I don't think that's going to happen. Okay.

11 If the debtor wants to maintain exclusivity, which no
12 one has disputed at that point of this stage, it needs to move
13 forward with negotiations with the creditors' committee and
14 other important creditor constituencies. And I plan to keep a
15 tight leash on it. And I plan to do that by selecting a date
16 shorter than all of you have suggested for an extension of
17 exclusivity with the full intention that if everybody's
18 cooperating and trying to move forward, I'll grant another
19 extension. But I'm not going to extend the date to sixty days
20 past the time -- thirty days past the time of the examiner
21 reports, sixty days past the time of the examiner reports. I'm
22 not going to do that now. I want to keep tight reigns on all
23 of you. I want to see that you're making progress or at least
24 making an effort to make progress. I don't want to hear that
25 the committee or other constituencies say the debtor simply

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

63

1 says they're bound by the plan support agreement that was
2 entered into, and they refuse to negotiate anything other than
3 those contained in them or they're constrained by what AFI
4 insisted on. If that's the position you want to take, we may
5 as well lift exclusivity, and you could all come forward with
6 competing plans. I don't think that's what you want.

7 MR. MARINUZZI: I don't think anybody wants that
8 result especially with a pending sale.

9 Your Honor, we can commit that next week we will sit
10 down and begin plan discussions with the committee and anybody
11 else that wants to begin having plan discussions. What I would
12 like to avoid, and we have not heard the date that Your Honor's
13 prepared to extend exclusivity through, is papers -- we don't
14 want papers being filed the day before we're here in front of
15 Your Honor again taking positions that really should be
16 discussed behind closed doors. If they're discovery issues,
17 issues that the Court should know about, they really shouldn't
18 be the subject of a pleading. They should be discussed. In
19 order to have fulsome successful plan negotiations, you need to
20 be able to sit down with people and have those negotiations.
21 We need to know what their concerns are.

22 THE COURT: I don't want to hear about the details of
23 any negotiations. They're settlement nego -- you know, a plan
24 process, a consensual plan process, in my view, they're
25 settlement negotiations. Just like every other settlement, I

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

64

1 don't want to hear about what's said in the negotiations.

2 Okay. That I want to make crystal clear to everybody.

3 MR. MARINUZZI: That's the point I'm trying to make,
4 Your Honor.

5 THE COURT: Okay. Mr. Eckstein?

6 MR. ECKSTEIN: Your Honor, we are concerned about the
7 fact that while a lot of progress has been made in the case --
8 and I do want to give the debtor credit for the fact that a lot
9 of progress has been made. I think we know that we worked
10 intensely during June to put in place the DIP, to put in place
11 the asset sale procedures. We worked through the Ally
12 subservicing issues. The foundation for the sale was in place
13 by mid-June. The Court spent many, many hours on that. And
14 the debtor did a good job in ultimately getting us to the right
15 place.

16 That was June. All the discovery that we had, that
17 the committee felt was necessary in connection with the AFI
18 investigation, was also known by June.

19 THE COURT: Let me ask you this, Mr. Eckstein. Let's
20 look forward rather than back. All right. We are where we are
21 in the case. Okay. And I'm more interested in what the major
22 constituents would like to see the process going forward. How
23 would you like to proceed?

24 MR. ECKSTEIN: Fine. That's appropriate, Your Honor.
25 Your Honor, as we see it, there are probably five major

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

65

1 constituencies in the case. You have the debtor, you have AFI,
2 then you have the junior bonds which were the subject -- at
3 least the ad hoc committee of the junior bonds were the subject
4 of a pre-petition plan support agreement. And that's an issue
5 we should come to in a moment.

6 Within the unsecured constituency, you have the
7 trustees or certificate holders, depending upon -- well, let's
8 call them, really, a constituency, the RMBS claimants. You
9 have the monolines, MBIA, FGIC, both of whom are members of the
10 committee plus several others. You have a variety of claimants
11 whose claims arise out of the purchase of securities from the
12 debtor, but they're also related to the RMBS claims. These
13 were the issuance of the RMBS claims through the public
14 issuance of securities which were underwritten. And those
15 claimants also have claims against AFI. Then you have an issue
16 of public debt, a billion dollars of public debt represented by
17 Wilmington Trust that is sitting at the Holdco.

18 And the fact of the matter is three of the trustees,
19 the monolines, the securities claimants and the holdco bonds
20 are also represented on the creditors' committee. There's also
21 a representative of borrowers who have a representative on the
22 creditors' committee as well.

23 THE COURT: I've writtend down seven.

24 MR. ECKSTEIN: So there are actually --

25 THE COURT: How many of the seven are represented on

RESIDENTIAL CAPITAL, LLC, ET AL.

66

1 the committee?

2 MR. ECKSTEIN: Five of the seven are represented on --

3 THE COURT: Which -- so it's the --

4 MR. ECKSTEIN: The RMBS --

5 THE COURT: RMBS, the monolines --

6 MR. ECKSTEIN: -- the monolines, the securities
7 claimants --

8 THE COURT: Yes.

9 MR. ECKSTEIN: -- the holdco bonds and the borrowers.
10 They were all on the creditors' committee.

11 THE COURT: So at least in the first instance, the
12 committee and its professionals are the -- because the bigger
13 the group the harder it is to get anything done. So
14 realistically, you represent the committee. The committee is
15 made up of a group of constituents, all who are important to
16 the process. But it seems to me that in how you go forward in
17 the first instance, it's the debtor, AFI, the junior bonds, the
18 committee. Is there any other essential player in that?

19 MR. ECKSTEIN: I believe those are the players, Your
20 Honor. The -- within the committee, I identified various --

21 THE COURT: Right.

22 MR. ECKSTEIN: -- sub-constituencies.

23 THE COURT: Right. And let's assume that those are
24 the constituents, at least in the first instance, how would you
25 propose to go forward if you could set out a process to go

RESIDENTIAL CAPITAL, LLC, ET AL.

67

1 forward?

2 MR. ECKSTEIN: One more observation, Your Honor. With
3 the exception of the holdco bonds who are at the holdco rather
4 than the opcos, all of the claimants are essentially litigation
5 or disputed claimants. We don't really have fixed debt. And
6 so, all of the claimants, by definition, warrant negotiation
7 and compromise in order for them to be resolved. Otherwise,
8 the Court's going to have to litigate every claim. So these,
9 probably more than most, really require a process where the
10 parties are going to be in the room. And one of the --

11 THE COURT: Yeah. But, you know, in the first
12 instance, Mr. Eckstein -- maybe I'm mistaken. I think if
13 there's a core group in the first instance that sits down and
14 tries to agree on, okay, here are the components that have to
15 go into it. Here's a process how we go forward. And maybe at
16 the end of the day, because of the litigation claimants, that
17 are probably debt holders or whatever, there has to be a direct
18 negotiation with them. But in terms of trying to set a
19 framework for how a process should go forward, you can't get --
20 if you have everybody at this table, nothing's going to get
21 done. Okay I'm perfectly --

22 You know, I've been running this constant battle for
23 the last two months with construction in the building. Can
24 somebody call Deanna and have them -- this has been a constant
25 battle.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

68

1 You can certainly bring to bear -- at least in the
2 first instance, you can't resolve the claims of your various
3 constituents, but you can certainly be an able spokesman for
4 setting out the process of how that's going to go forward.
5 Okay? You can consult with each of them, take their views into
6 account, represent the committee in trying to come up with a
7 process. What I -- 'cause what I want -- and I'm going to want
8 to ask Mr. Lee the same question. What I want is I want an
9 agreement today about how you're all going to proceed with a
10 process, and you're going to carry forward with it, and then
11 I'm going to get periodic reports, not on the detail, I don't
12 want to know the substantive details of what you're
13 negotiating, but how you're moving forward. Okay.

14 Any other points you want to make at this point?

15 MR. ECKSTEIN: I just want to make it clear, Your
16 Honor, I have met with each of the members of my committee
17 individually, and I can represent they're all prepared to
18 participate in a process, and I would agree that the committee
19 and the debtor need to sit down immediately and work out a
20 framework for there to be discussions among the constituencies
21 in a constructive way. And I believe over the next ninety days
22 --

23 THE COURT: Well, you don't --

24 MR. ECKSTEIN: -- that's what can happen.

25 THE COURT: The junior bonds are not represented on

RESIDENTIAL CAPITAL, LLC, ET AL.

69

1 the committee.

2 MR. ECKSTEIN: No. The junior bonds are not. We need
3 to also interact with the junior bonds. We have issues --

4 THE COURT: I understand.

5 MR. ECKSTEIN: -- with the junior bonds --

6 THE COURT: Okay.

7 MR. ECKSTEIN: -- and we've begun a dialogue with them
8 as well.

9 THE COURT: Let me hear from Mr. Lee. Okay. I'll
10 give you another chance --

11 MR. ECKSTEIN: Okay. Fine.

12 THE COURT: -- Mr. Eckstein, but I want --

13 MR. LEE: Gary Lee from Morrison & Foerster for the
14 debtors. Your Honor, actually, Mr. Eckstein and I have already
15 begun to have this precise discussion whether it was in
16 anticipation of what Your Honor was going to say today. And
17 from the debtors' perspective, I think what we need to do first
18 is to sit down with Mr. Eckstein once we've got through this
19 hearing.

20 I think what we need to do is actually identify the
21 issues that will stand in the way of crafting a plan before we
22 get to the components of the plan. And we, obviously, I think,
23 all know a number of what those issues are. We can then talk
24 about the process.

25 We have undertaken, Your Honor, to actually meet with

RESIDENTIAL CAPITAL, LLC, ET AL.

70

1 the full committee at the beginning of next month. The reason
2 it's at the beginning of next month was to actually give us an
3 opportunity not just to have identified the issues, but
4 actually, you know, had some thought about what the process is
5 and the best way to bridge things. So the idea, Your Honor,
6 was that this was not going to be frozen in time until after
7 the examiner issues his report. We intend for this to be live
8 and engaging, and we will begin that process immediately.

9 THE COURT: Well, here's what I want. You're back on
10 September 27th.

11 MR. LEE: Yes, Your Honor.

12 THE COURT: And between now and September 27th, you'd
13 need, in this first period between now and then, to meet and
14 confer with Mr. Eckstein and try and agree on a stage process
15 going forward. I want you to report on -- Mr. Eckstein can
16 take counsel from his various constituents on his committee. I
17 want to assure the junior bondholders and anybody else who's
18 not represented on the committee that I'm not shutting you out
19 of this process. But in the first instance, sit with Mr.
20 Eckstein, identify the issues that you see that are going to be
21 plan negotiation issues. See if you can get agreement in the
22 first instance on that. Try and come up with a proposed
23 process, an active proposed process that will go forward
24 promptly. Report to the Court on September 27th about where
25 you are on that.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

71

1 I think it's important that AFI, and the junior
2 bondholders, and any other of the constituents that have been
3 identified that are not represented on the committee quickly be
4 included within the process, so that I don't feel like they're
5 being shut out. But I think in the first instance, you and Mr.
6 Eckstein confer and see if you can agree, and I want a report
7 back on September 27th.

8 For now, what I'm doing is I'm going to extend
9 exclusivity to 5 p.m. Thursday, December 20th. And --

10 MR. MARINUZZI: Did you say December 20th, Your Honor?

11 THE COURT: I said December 20th.

12 MR. MARINUZZI: Thank you.

13 THE COURT: I fully expect that I'll -- you know,
14 barring completely unforeseen circumstances, I'll grant another
15 extension before then. I don't need lengthy papers. I think I
16 have free complete discretion about what I do on extending
17 exclusivity. The debtor is entitled to an opportunity if it's
18 proceeding -- if you're satisfying those factors that Judge
19 Gerber has identified that I've applied in many cases so far,
20 you'll get an extension of exclusivity, but I want to see real
21 progress. This is not going to sit and wait.

22 So, for now, present an order that extends exclusivity
23 to 5 o'clock on December 20th. I'll even shorten your time to
24 bring on motions to extend exclusivity before that. Mr.
25 Marinuzzi, you're --

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

72

1 MR. MARINUZZI: Your Honor, I just want to be clear on
2 what Your Honor is ordering because we've got the plan filing
3 deadline, then we've got the solicitation deadline. And I know
4 you extended the filing deadline to December 20th.

5 THE COURT: Right. Just to give the --

6 MR. MARINUZZI: Sixty days out.

7 THE COURT: -- corresponding --

8 MR. MARINUZZI: Okay.

9 THE COURT: -- sixty days. I use that as the first of
10 the dates, yes.

11 MR. MARINUZZI: Thank you.

12 THE COURT: Prepare an order that appropriately has
13 the date sixty days after that. Okay?

14 MR. MARINUZZI: We'll do that. Thank you, Your Honor.

15 THE COURT: All right.

16 MR. LEE: I mean, Your Honor, we will work with the
17 committee and ensure that we've made --

18 THE COURT: I can't hear you, Mr. Lee.

19 MR. LEE: I'm sorry, Your Honor. We will work with
20 the committee and ensure that we will have made sufficient
21 progress to have both identified the issues and have a process
22 for going forward, and to the extent possible between now and
23 then, actually to have begun an active process as well.

24 THE COURT: Okay.

25 MR. LEE: Thank you, Your Honor.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

73

1 THE COURT: Mr. Marinuzzi?

2 MR. MARINUZZI: Your Honor, unless somebody else wants
3 to be heard --

4 THE COURT: I see people jumping up. Mr. Goldman, you
5 wanted to be heard?

6 MR. GOLDMAN: I do. Thank you, Your Honor.

7 THE COURT: Your client is --

8 MR. GOLDMAN: Aurelius.

9 THE COURT: -- Aurelius?

10 MR. GOLDMAN: Thank you, Your Honor. As I said,
11 Daniel Goldman, Akin Gump, counsel for Aurelius Capital
12 Management. Very briefly, Your Honor. I just wanted to point
13 out what may be a misimpression. Aurelius is a holder of the
14 junior secured bonds. It holds approximately eight percent or
15 165 million. The junior secured bonds are not a monolithic
16 group. A minority of the bonds or the ad hoc group doesn't
17 constitute a majority of the bonds, nor does the plan support
18 agreement signed by the junior secured bonds does not represent
19 a majority of the class. So it's difficult to talk about the
20 junior secured group as one constituency.

21 The other point I'd like to make, we have no objection
22 to Your Honor's rulings both as to the date and as to the
23 process. We believe that we will be kept well advised and well
24 informed, and we will have our opportunity at the bargaining
25 table.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

74

2 We do agree, though, Your Honor, with the point that
3 you made that this case need not stand still until the issuance
4 of the examiner's report. That was a point we made in our
5 pleadings. There are a whole variety of plans that could be
6 formulated here. And the overarching issue regarding AFI and
7 claims against the AFI can be dealt with in a number of ways.
8 We're not here to say that an ultimate settlement with AFI may
9 not be the appropriate course, but there are other courses of
10 action. If the examiner identifies potential claims against
11 AFI, they can be dealt with in connection with a post-
12 confirmation litigation trust. It's been done numerous times.
13 I don't think that --

14 THE COURT: You know, I would just note that the
15 Dynegy case confirmed this week, I guess, and a lot happened
16 after the examiner's report there. And, you know, I don't know
17 what -- we'll see what happens here. I don't know.

18 MR. GOLDMAN: So, Your Honor, Aurelius, for its
19 position on the junior secured bonds, stands ready, willing and
20 prepared to, and anxious to start the arduous process of
21 negotiating a plan in these cases.

22 THE COURT: Thank you, Mr. Goldman.

23 MR. GOLDMAN: Thank you.

24 THE COURT: Anybody else who has a burning desire to
25 say something?

26 MR. O'NEAL: Sean O'Neal, Cleary Gottlieb, on behalf

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

75

1 of Wilmington Trust. Just very, very short. I think Your
2 Honor has pinpointed one of the main concerns we've had is that
3 the plan discussions should not be on hold. I think as evident
4 by the debtors' process with respect to the holdco election and
5 the changes to the RMBS settlement agreement, we have had
6 concerns that other parties have been involved in plan
7 discussions, be it AFI, or the RMBS trustees, or the RMBS
8 investors, or the junior secured noteholders, but not
9 Wilmington Trust or any of the noteholders. So we look forward
10 to participating in those discussions. And we will play a
11 constructive role in that process. We don't know if we'll
12 reach a settlement, obviously, but we do stand by ready to
13 engage in those discussions.

14 THE COURT: Thank you very much. Anything else on the
15 agenda, Mr. Lee? Mr. Marinuzzi?

16 MR. MARINUZZI: Your Honor, I'm on page 13 of the
17 agenda, on the debtors' unopposed motion for an order extending
18 the 365(d)(4) period to assume or reject executory contracts
19 and leases.

20 THE COURT: What page are you on? Can you tell me
21 again?

22 MR. MARINUZZI: It's page 13 of the agenda, the
23 amended agenda.

24 THE COURT: Yes.

25 MR. MARINUZZI: Your Honor, there was no objection to

RESIDENTIAL CAPITAL, LLC, ET AL.

76

1 the motion. It seems to --

2 THE COURT: Anybody wish to be heard? The motion's
3 granted.

4 MR. MARINUZZI: Thank you, Your Honor. Your Honor,
5 that brings us, unless I skipped something, to the committee's
6 application to expand the scope of their retention of Moelis &
7 Company. And I'll turn it over to Kramer Levin.

8 THE COURT: Thank you.

9 MR. BENTLEY: Good morning, Your Honor. For the
10 record, Philip Bentley of Kramer Levin on behalf of the
11 committee. Your Honor, we have two retention applications
12 before the Court today. They're both for experts that we're
13 retaining in connection with our RMBS evaluation. I would just
14 note there are two more retention applications that we'll be
15 filing in the next few days. That will round out and complete
16 our expert team.

17 I can explain to Your Honor how they fit together if
18 you'd like, but I'm happy to dispense without it.

19 THE COURT: No. Let me see. Mr. Driscoll, are you
20 going to speak on behalf of the U.S. trustee?

21 MR. DRISCOLL: Yes, Your Honor.

22 THE COURT: Why don't you come on up to the
23 microphone? I gather, in the first instance, there was an
24 issue of whether all of these experts had to be retained or
25 whether any of them would be an expense for one of the other

RESIDENTIAL CAPITAL, LLC, ET AL.

77

1 experts. The decision, I think, based on the U.S. trustee's
2 views is that they should go forward with retention
3 applications. Do I have that correct?

4 MR. DRISCOLL: Your Honor, we did not have discussions
5 with the committee before they filed those retentions.

6 THE COURT: Okay.

7 MR. DRISCOLL: They did file those retentions. We've
8 reviewed those, and we have no objections.

9 THE COURT: Thank you.

10 MR. DRISCOLL: With respect to Moelis, the form of the
11 order is acceptable. So we have no objection there.

12 With respect to San Marino, our discussions post-
13 filing of the motion was that the committee would split those
14 retentions between San Marino and Coherent to reflect an issue
15 in paragraph 21 of the application which said that there was
16 going to be a twenty percent -- San Marino would collect twenty
17 percent of Coherent's fees and billing. So we requested that
18 that -- to address potential issues of fee sharing, we
19 requested that those retentions be split, and that's what
20 you'll see today, Your Honor.

21 THE COURT: Okay. Has that been -- you've got an
22 agreement on that?

23 MR. DRISCOLL: Yes, Your Honor. That's our
24 understanding.

25 THE COURT: Okay. Anybody else wish to be heard with

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**
1 respect to the committee's retention application?

2 MR. DRISCOLL: Thank you, Your Honor.

3 THE COURT: Thank you very much, Mr. Driscoll. Mr.
4 Marinuzzi?

5 MR. MARINUZZI: Your Honor, I know that we went back
6 and forth with debtors' counsel to understand a little bit more
7 about the basis and need for the retentions, concerning about
8 overlap, duplication, et cetera. We're satisfied that they've
9 been addressed in the form of order that are being presented.

10 THE COURT: Thank you very much, Mr. Marinuzzi.

11 MR. MARINUZZI: Thank you.

12 THE COURT: Anybody else wish to be heard? All right.
13 Then they're approved.

14 MR. MARINUZZI: Thank you.

15 MR. BENTLEY: Your Honor, we will e-mail to the Court
16 this afternoon the revised one.

17 THE COURT: That's fine. Thank you very much --

18 MR. BENTLEY: Thank you, Your Honor.

19 THE COURT: -- Mr. Bentley. Mr. Marinuzzi, anything
20 else?

21 MR. MARINUZZI: Your Honor, I'm trying to locate on
22 the agenda. We had a number of lift stay motions that have
23 been resolved by stipulation.

24 THE COURT: Right.

25 MR. MARINUZZI: And certificates of no objection, I

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

79

1 understand, were filed with respect to those stipulations.

2 We've received no objections or other pleadings with respect to
3 the motion. We think everything is settled with the
4 stipulations.

5 THE COURT: Right. And those will be approved.

6 I saw them listed --

7 MR. MARINUZZI: Thank you very much.

8 THE COURT: -- on the agenda.

9 MR. MARINUZZI: And I believe that's everything on for
10 today.

11 THE COURT: What's the -- we're supposed to have a
12 pretrial --

13 MR. MARINUZZI: Oh.

14 THE COURT: -- about Green Planet. You've resolved
15 that by stipulation, Mr. Rosenbaum?

16 MR. ROSENBAUM: Your Honor, Norm Rosenbaum for the
17 debtors. Yes, Your Honor approved the stipulation --

18 THE COURT: Did I sign it already?

19 MR. ROSENBAUM: Yes. Yes, you did, yesterday.

20 THE COURT: Good.

21 MR. ROSENBAUM: Thank you.

22 THE COURT: All right. Anything else?

23 MR. MARINUZZI: Your Honor, just to clarify, the pre-
24 auction objection -- the hearing on the pre-auction objection
25 is on for September --

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

80

2 THE COURT: I thought it's October 17th, no?

3 MR. GOREN: Your Honor, it's -- Todd Goren, Morrison &
4 Foerster. It's still scheduled for September 27th. We're
5 working with the trustees. We're hopeful we'll have a
6 resolution before the 27th that will likely require that it
7 gets kicked to the 17th to fully resolve it, but as of today,
8 it's still scheduled for the 27th.

9 THE COURT: Thank you, Mr. Goren. All right. And
10 when is your -- okay. If it's on for the 27th, what is it
11 that's going to be on for the 27th? I thought I was told
12 earlier that the response to the pre-auction objections was due
13 on October 10th.

14 MR. GOREN: I think that was based on an October 17th
15 hearing date. I believe you had given us, I would have to go
16 back and double check my e-mails, September 24th for responses?

17 THE COURT: Okay. I just want to be sure that if it's
18 going forward, I get papers and can prepare and all that.

19 MR. GOREN: Yes.

20 THE COURT: Okay? Thank you, Mr. Goren. All right.
21 You wanted to be heard?

22 MR. FINAY: Bradley Finay (ph.), of counsel, McCabe
23 Weisberg & Conway. I --

24 THE COURT: Just tell me your name one more time.

25 MR. FINAY: I'm Bradley Finay.

26 THE COURT: Thank you, Mr. Finay.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

81

1 MR. FINAY: Your Honor, I just don't know what the
2 adjourned date for the lift stay motions is. I have two lift
3 stay motions on today. Have they been resolved?

4 THE COURT: Talk to Mr. -- just walk over and talk to
5 Mr. Marinuzzi and Mr. Rosenbaum and see. I thought everything
6 was adjourned until September 27th.

7 (Pause)

8 MR. FINAY: Thank you, Your Honor. Sorry for
9 interrupting.

10 THE COURT: No. It's no interruption. That's okay.
11 All right. Mr. Lee, the lift stays that were originally on for
12 today, they're sort of unlike the group that have come on
13 before today. I gather these are ones where GMAC is a second
14 mortgagee, and the first mortgagee is moving to foreclose, and
15 in order to clear title, they need to have the second mortgagee
16 as a party. Do I understand those sort of correctly?

17 MR. LEE: Yes, Your Honor. We filed a motion, I
18 believe, yesterday in order to establish procedures to
19 streamline --

20 THE COURT: Okay.

21 MR. LEE: -- this process particularly where the
22 debtors have no economic interest --

23 THE COURT: Right.

24 MR. LEE: -- to try and resolve that.

25 THE COURT: Okay.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

82

1 MR. LEE: Yes, Your Honor.

2 THE COURT: And just one last question. At the last
3 hearing, there was the issue, and I don't remember the name of
4 the case, the Alabama case, where it was scheduled for trial in
5 September. And I directed counsel to go off and confer, and
6 see if you could resolve the issues. I never heard anything
7 back. Can anybody inform me of what's happened?

8 MR. LEE: Your Honor --

9 THE COURT: Mr. Rosenbaum?

10 MR. LEE: -- may I turn the podium over?

11 THE COURT: Thank you.

12 MR. ROSENBAUM: Your Honor, it's the -- I think it was
13 called the Silvan matter pending in state court Alabama. We
14 have been conferring with counsel for the plaintiffs. We don't
15 have a resolution yet. They've been somewhat difficult to get
16 a hold of. And I think what we decided is we'd try a written
17 proposal to see if we can come to an agreement, but we have
18 been aggressively trying to get a hold of them.

19 THE COURT: All right. I would ask that it be put on
20 the calendar for a status conference on September 27th, that
21 you make sure that the plaintiffs' counsel in that case -- I
22 guess it's actually the defendants' counsel. It's an action to
23 recover possession of property by GMAC.

24 MR. ROSENBAUM: That's correct. You're right, Your
25 Honor.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

83

1 THE COURT: They've asserted affirmative defenses and
2 counterclaims. Make sure that counsel is advised of the
3 September 27th status conference, and they're authorized to
4 appear by telephone.

5 MR. ROSENBAUM: We'll do so, Your Honor.

6 THE COURT: Okay. All right. Thank you. Mr.
7 Marinuzzi?

8 MR. MARINUZZI: Your Honor, just one final point
9 related to this, and Your Honor reminded me of this. We're
10 currently formulating, and we'll talk to the committee about it
11 after the hearing, some modification to the bar date papers,
12 maybe the order, because we're hearing questions from borrowers
13 asking if they don't return a proof of claim, will they lose
14 their ability to assert an affirmative defense to a
15 foreclosure. It's not the intention of the bar date order to
16 do that.

17 THE COURT: Right.

18 MR. MARINUZZI: Monetary damages are different.
19 Rather than field many phone calls, we'd like to publish
20 something to let them become aware of that.

21 THE COURT: Okay.

22 MR. MARINUZZI: Thank you.

23 THE COURT: I hope you can work that out.

24 All right. Anything else for today? All right.
25 We're adjourned. Thank you.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

84

1 MR. MARINUZZI: Thank you.

2 THE COURT: See you next Wednesday.

3 (AM session concluded at 11:42 AM)

4 (Begin PM session at 2:04 PM)

5 THE COURT: Please be seated. All right. We're here
6 in Residential Capital LLC, number 12-12020. Mr. Glenn?

7 MR. GLENN: Good afternoon, Your Honor. Andrew Glenn,
8 Kasowitz Benson Torres & Friedman along with Kanchana Leung and
9 Daniel Fliman on behalf of the Federal Housing Finance Agency
10 acting as conservator for Freddie Mac and Fannie Mae.

11 Your Honor, we're here pursuant to the adjourned
12 motion that we filed. We understand that the other parties to
13 the proceeding before Judge Cote have also filed a separate
14 motion seeking additional information.

15 Before we proceed, I wanted to bring one update to
16 Your Honor's attention; it was a late breaking development
17 solely from our end. We have consulted with our sampling
18 experts in this case, and we are prepared further to cut our
19 request at this point in time by half to 2,500 loan files to be
20 selected by the expert after the conclusion of these
21 proceedings. Otherwise, we'll be guided by Your Honor in terms
22 of how you want to proceed today given the argument that we
23 presented in the last hearing.

24 THE COURT: Let me ask you this. Are you introducing
25 any evidence as part of your affirmative case?

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 85

1 MR. GLENN: No, Your Honor. We have the transmittal
2 declarations and that's all.

3 THE COURT: What do you mean by the transmittal
4 declarations?

5 MR. GLENN: The declarations of Ms. Leung, my partner.

6 THE COURT: All right. Do you want to -- I think
7 what -- if you're going to offer anything in evidence, you
8 ought to do that. Let me ask you, are you going to cross-
9 examine the declarants that ResCap has proffered?

10 MR. GLENN: I don't believe so, Your Honor.

11 THE COURT: Okay. Because this is an evidentiary
12 hearing, if there are -- if there's anything you wish to
13 introduce in evidence, offer it now, okay, including, if you're
14 offering your partner's declaration. Identify it specifically
15 for the record, indicate the nature of the offer, et cetera.
16 Okay?

17 MR. GLENN: We offer the two declarations of Kanchana
18 Wangkeo Leung. One was submitted as part of our application
19 and the other one was a supplement affidavit in our reply
20 briefing.

21 THE COURT: Can you identify those by ECF document? I
22 mean the debtors have put everything together in a binder. Do
23 you have that --

24 MR. GLENN: I believe I have that --

25 THE COURT: It looks like you've got it. It's just I

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 86

1 want to be clear what is part of the record before me on which
2 I'm going to rule.

3 MR. GLENN: Docket number 808 and 1296.

4 THE COURT: All right. Are there any objections to
5 those two declarations? Mr. Haims?

6 MR. HAIMS: No, Your Honor.

7 THE COURT: All right. The two Leung declarations at
8 ECF docket numbers 808 and 1296 are admitted in evidence.
9 (Declaration and supplemental declaration of Kanchana Wangkeo
10 Leung was hereby received into evidence as of this date.)

11 THE COURT: All right. Do you rest at this point?

12 MR. GLENN: Well, on the evidence, Your Honor --

13 THE COURT: Yes.

14 MR. GLENN: -- yes, we rest.

15 THE COURT: Okay. All right. Mr. Haims, are you
16 going to -- I think you ought to start by offering in evidence
17 whatever you're going to proffer.

18 MR. HAIMS: Your Honor, I'd like to start by -- before
19 I just do the evidence, just to say that Your Honor has been
20 clear that the automatic stay applies to third party discovery.
21 And Your Honor also stated that anyone --

22 THE COURT: I was not. I think you misstate what I
23 said. We'll deal with it. I think that the Kasowitz firm
24 accurately collected -- I asked a question whether the use of
25 the term "process" in 362(a) applied to subpoenas -- third

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

87

1 party subpoenas. And I may have pondered whether -- you know,
2 why didn't it. But I asked that that issue be addressed in
3 briefs. Kasowitz addressed it and your brief just simply
4 recites the Court has already determined that 362(a) applies.
5 I did no such thing. I asked a question based on the language
6 of the statute. I asked that it be addressed. You chose in
7 your brief to address it by saying the Court's already decided
8 it. Kasowitz addressed it by addressing the substance of it.
9 I have not decided whether 362(a) applies to subpoenas served
10 in other litigation.

11 MR. HAIMS: Okay, Your Honor. So I will offer into
12 evidence the following declarations. We have the first the
13 declaration of Jeffrey Lipps, which is document number 1023 --
14 1023.

15 THE COURT: Dash -- I'm sorry?

16 MR. HAIMS: Dash 1.

17 THE COURT: Dash 1. Okay. Go ahead. Anything else?
18 I'll take them as --

19 MR. HAIMS: Take -- oh, I'm sorry.

20 THE COURT: Mr. Glenn, are you going to object to any
21 of these declarations?

22 MR. GLENN: Your Honor, I think we have one general
23 subject matter. After all the affidavits are proffered, we
24 would like to address those.

25 THE COURT: That's fine.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

88

2 MR. GLENN: Thank you.

3 THE COURT: All right. Go ahead, Mr. Haims.

4 MR. HAIMS: There's the declaration of John G.

5 Mongelluzzo, which is document 1023-2, which was filed on
August 7th, 2012.

6 THE COURT: Okay.

7 MR. HAIMS: There's the declaration of John G.

8 Mongelluzzo, which is document number 1295-2, filed on August
9 28th, 2012. There's the declaration of Mary Fahy Woehr, which
10 is document number 1295-1, filed on August 28th, 2012. And the
11 declaration of Philip Marc Scheipe, document number 1299, filed
12 on August 28th, 2012. Those are the declarations.

13 THE COURT: All right. Mr. --

14 MR. HAIMS: We also submitted --

15 THE COURT: No. Go ahead. I'm sorry.

16 MR. HAIMS: -- a binder of exhibits.

17 THE COURT: Yes, but let me deal with the declarations
18 first.

19 MR. HAIMS: Okay.

20 THE COURT: Okay.

21 MR. HAIMS: Sure.

22 THE COURT: Go ahead, Mr. Glenn. You have objections?

23 MR. GLENN: Your Honor, Ms. Leung will handle that.

24 THE COURT: Okay. Ms. Leung?

25 MS. LEUNG: Kanchana Leung of Kasowitz Benson.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

89

1 THE COURT: You're going to have to speak into the
2 microphone.

3 MR. GLENN: You can sit here.

4 THE COURT: Okay? I want to be sure we have a clear
5 transcript.

6 MS. LEUNG: Kanchana Leung of Kasowitz Benson. As to
7 the declarations, we object to the paragraphs in portions of
8 the Mongelluzzo, Woehr and Scheipe declarations that purport to
9 speak as to the intent of the parties when they negotiated and
10 entered into the shared services agreement. There has been no
11 argument by any party that the agreement is ambiguous and that
12 there is a need for any parol evidence as to intent. And so,
13 we would, as a general subject matter objection, object to all
14 those paragraphs and ask that those be stricken and not
15 considered.

16 THE COURT: Okay. Mr. Haims, you want to address
17 that?

18 MR. HAIMS: Your Honor, we agree that the language
19 says what it says, and is clear in what it says, and that it
20 doesn't provide, as we said, for these productions. However,
21 to the extent that it doesn't and intent is an issue, we
22 respectfully disagree and think that intent is certainly an
23 issue here. And the intent -- to the extent that Your Honor is
24 construing the language, the case law is pretty clear that you
25 could look at intent to see how the specific language is to be

RESIDENTIAL CAPITAL, LLC, ET AL.

90

1 construed. Both parties here, Mr. Scheipe, on one side, and
2 the ResCap defendants on the other -- the ResCap declarants on
3 the other side, have testified as to what their intent was in
4 their negotiations in drafting the agreement. We think it's
5 clear --

6 THE COURT: But if the language --

7 MR. HAIMS: We think it's clear, but if you're going
8 to get --

9 THE COURT: Let me ask this. Under New York -- New
10 York law governs, correct?

11 MR. HAIMS: Correct.

12 THE COURT: If under New York law the language of a
13 contract is clear and unambiguous, parol evidence is not
14 admissible for purposes of determining the meaning of a
15 contract. Do you agree with that?

16 MR. HAIMS: I agree with that.

17 THE COURT: All right. Here's what I'm going to do.
18 I'm going to -- all the declarations are admitted into
19 evidence. The Court is reserving decision about the objection
20 from Ms. Leung with respect to the statements of intent. I
21 have not fully resolved, in my own mind, this issue of whether
22 the agreement is clear and unambiguous and therefore parol
23 evidence should not be considered. If parol is admissible, I
24 think it's fair to say this is the only evidence that's been
25 offered with respect to -- that would be parol evidence, but I

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

91

1 haven't decided that. So I'm going to reserve decision on the
2 admissibility of testimony with respect to the supposed intent
3 of the parties. Okay.

4 (Declaration of Jeffrey A. Lipps in support of debtors'
5 objection to motion of the Federal Housing Finance Agency for
6 relief from the automatic stay was hereby received into
7 evidence as of this date.)

8 (Declaration and supplemental declaration of John G.
9 Mongelluzzo in support of AFI's submission regarding the shared
10 services agreement was hereby received into evidence as of this
11 date.)

12 (Declaration of Mary Fahy Woehr in support of debtors'
13 objection to motion of the Federal Housing Finance Agency for
14 relief from the automatic stay was hereby received into
15 evidence as of this date.)

16 (Declaration of Philip Marc Scheipe in support of AFI's
17 submission regarding the shared services agreement was hereby
18 received into evidence as of this date.)

19 THE COURT: You want to address your --

20 MR. HAIMS: Yeah.

21 THE COURT: -- exhibits?

22 MR. HAIMS: Yeah. We have an exhibit binder --

23 THE COURT: Yes.

24 MR. HAIMS: -- which was submitted. It has --

25 THE COURT: I have that here.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

92

1 MR. HAIMS: -- certain exhibits listed as Exhibits 1

2 through 8. And I'm happy to move them in as one or --

3 THE COURT: Well, let's --

4 MR. HAIMS: -- take them through, whatever is --

5 THE COURT: -- do it that way. Offer them all and
6 then I'll --

7 MR. HAIMS: I'll offer this binder in evidence.

8 THE COURT: Okay. All right. The debtors' have
9 offered and have presented to the Court an exhibit binder with
10 exhibits premarked as Exhibits 1 through 8 and have now offered
11 them in evidence. Mr. Glenn or Ms. Leung, do you have any
12 exhibits?

13 MR. HAIMS: These are all the exhibits that were
14 attached to our declarations.

15 MR. GLENN: No objection.

16 MR. HAIMS: There's no new --

17 THE COURT: All right. So the documents marked as
18 Exhibits 1 through 8, Debtors' Exhibits 1 through 8, are
19 admitted in evidence for purposes of the hearing.

20 (Debtors' Exhibits 1 through 8 were hereby received into
21 evidence as of this date.)

22 MR. HAIMS: And we have no further evidence, Your
23 Honor.

24 THE COURT: All right. You rest?

25 MR. HAIMS: We rest.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

93

2 THE COURT: You responded that you do rest?

2 MR. HAIMS: Yes, Your Honor.

3 THE COURT: Okay. All right. Just to be clear, Mr.
4 Glenn, do you wish to cross-examine any of the declarants?

5 MR. GLENN: No, Your Honor.

6 THE COURT: All right. Do you have any rebuttal
7 evidence you wish to offer?

8 MR. GLENN: We do not, Your Honor.

9 THE COURT: All right. You rest as well?

10 MR. GLENN: We do.

11 THE COURT: All right. Now let me hear argument then.
12 Go ahead, Mr. Glenn.

13 MR. GLENN: Thank you, Your Honor. I don't want to
14 take the Court's time on issues that I know the Court has
15 examined closely and that we talked about last time that we
16 briefed on a supplemental basis. I think the Court is in a
17 difficult situation in this case, because it is a very unique
18 case and the Court is being asked to decide a legal question
19 that could have far-reaching ramifications beyond this very
20 unique case. And that is, does the automatic stay apply to
21 third party discovery.

22 We don't think it does for all the reasons we've set
23 forth in our papers. We have addressed the Johns-Manville
24 case. We've talked about all the other cases around the
25 country that go our way. I think as a general rule --

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

94

1 THE COURT: Well, let me ask you, Hillsborough

2 Holdings which you rely on --

3 MR. GLENN: Yes.

4 THE COURT: Judge Paskay's decision in Florida --

5 MR. GLENN: Yes.

6 THE COURT: Manville. Both of those cases involved
7 issues of discovery -- efforts to take discovery from employees
8 of the debtors in those cases, not from the debtors themselves.
9 And in this case, in its present posture, the issue is whether
10 discovery from the debtors should be permitted.

11 MR. GLENN: That's correct.

12 THE COURT: So you had pointed out -- at the last
13 hearing when I raised the issue about Manville, you said there
14 was an adversary pending, that you can't get an injunction
15 without an adversary proceeding, 105 -- your argument that 105
16 can't apply against FHFA. But the issues in those cases where
17 discovery -- I mean, I don't have before me a subpoena from
18 FHFA for present or former officers or employees of any of the
19 debtors. I have a subpoena for production of documents by the
20 debtors themselves. Do you agree with that?

21 MR. GLENN: Yes.

22 THE COURT: I haven't found any decisions at all that
23 address the issue of the power of a bankruptcy court to
24 regulate or limit discovery from the debtor in connection with
25 third party actions. Are you aware of any?

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

95

1 MR. GLENN: Under 362 --

2 THE COURT: Let me just --

3 MR. GLENN: -- the answer is no.

4 THE COURT: Let's put 362 -- my question is really
5 more -- let's assume that I agree with the Ninth Circuit BAP.
6 There really isn't much law on this point.

7 MR. GLENN: That's correct.

8 THE COURT: Okay. But let's assume I agree with the
9 Ninth Circuit BAP that 362(a) doesn't apply to third party
10 discovery from the debtor. You did brief it. You addressed
11 the legislative history and the wording in 362(a) itself. But
12 what I've been pondering is whether 105 provides the Court with
13 authority not to enjoin FHFA, but to extend the protection of
14 362(a) to discovery from the debtor. And it seemed to me in
15 thinking it through that doing so doesn't require an adversary
16 proceeding. It doesn't require an injunction. It is an order
17 -- it would be an order affecting the administration of the
18 case, affecting property of the estate. You may dispute around
19 the margins on this but the estimate of the cost of
20 complying -- the only evidence I have before me with respect to
21 an estimate of the cost of the debtor to comply is probably
22 over a million dollars. There are ranges that are given, and I
23 understand that. I don't want to get into quibbling about the
24 exact dollars from --

25 MR. GLENN: I would dispute that, Your Honor, insofar

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**
1 as our application is concerned. The other application is a
2 different story.

3 THE COURT: Well --

4 MR. GLENN: And I just want to make that clear
5 because --

6 THE COURT: Well, you've just reduced --

7 MR. GLENN: -- we're being punished for trying to be
8 reasonable in this case. So our application, the way we do the
9 math, Your Honor, just to be perfectly clear, 2,500 loan files
10 times approximately, give or take, twenty-five dollars.

11 THE COURT: Well, for the third party cost to retrieve
12 the files from the vendor --

13 MR. GLENN: Correct.

14 THE COURT: -- no lawyer in his right mind would
15 ever -- you would never produce documents that your office
16 hadn't screened for privilege or any other protection for here
17 issues of confidential borrower information. I mean, you just
18 wouldn't do that.

19 MR. GLENN: Ms. Leung is probably more qualified to
20 handle that, but as I understand it, there is no privileged
21 information in these loan files. The loan files --

22 THE COURT: What about personally identifiable
23 information?

24 MR. GLENN: That there is and that can be addressed,
25 and has been addressed, through a standard confidentiality

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 97

1 agreement with all the other defendants. I just don't see that
2 as -- it's an issue, but I don't think that's a cost issue.

3 I didn't mean to sidetrack, Your Honor, so much.

4 THE COURT: No.

5 MR. GLENN: I just wanted to make my position --

6 THE COURT: No. But here's --

7 MR. GLENN: -- clear.

8 THE COURT: Look, the non-Ally underwriters have said
9 we need all 43,000 loan files. And I understand that Judge
10 Cote said if you think you need it, you apply for it. Well,
11 they've now filed a motion.

12 The issue that I framed was whether 105 provides a
13 source of authority for the Court. I'm going to very -- I want
14 to be careful about -- this is not selected accidentally --
15 regulate discovery in a third party action. And I say
16 "regulate" because to the extent that a debtor or these debtors
17 were to argue to me that no discovery now, no discovery ever
18 from the debtors in connection with third party actions, I
19 think that's an unsupportable position to take.

20 I start with a 350 year old maxim that the public has
21 a right to every man's evidence. It's a proposition that has
22 been repeatedly relied upon by the U.S. Supreme Court, by the
23 circuit courts including the Second Circuit. And what the
24 courts have roughly said is that to limit that, if by statute
25 or if there is some privilege issue, it has to be a well

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

98

1 established privilege. And the issue in my mind is about
2 regulating it. Can the bankruptcy court, charged with
3 overseeing these Chapter 11 cases, regulate discovery? When do
4 you want the documents?

5 MR. GLENN: We want them as soon as we can get them.
6 I believe something in the order of sixty days would work, like
7 six -- about sixty days.

8 THE COURT: So over the next sixty days in this case,
9 there is an enormous amount of activity that's at the very core
10 of Chapter 11 bankruptcy proceedings. There is an auction
11 scheduled, I think, for October 23rd. There are twenty some
12 odd parties that have signed nondisclosure agreements that are
13 engaged in due diligence. If you or one of your colleagues was
14 here this morning, you know that there was extensive colloquy
15 about a contested hearing scheduled for November 5th for which
16 expedited discovery is underway and arguments that the debtor
17 hasn't fully complied with its obligations to produce
18 everything it was required to produce. So there's expedited
19 discovery ongoing for a very important hearing currently
20 scheduled for November 5th, whether it happens then or at a
21 later date, remains to be seen, but it'll happen soon. There's
22 an examiner's investigation going on.

23 There is -- what I think -- you can respond to this if
24 you'd like. I mean -- and I invite you to. With everything
25 that's going on in this case, the debtor has more than its

RESIDENTIAL CAPITAL, LLC, ET AL.

99

1 hands full over the next sixty days just to do what it is
2 required to do to move this Chapter 11 case forward. And
3 diverting -- at this time, diverting the resources -- let's put
4 who pays for it aside. Okay? Just diverting the people and --
5 you know, there was an argument this morning about the
6 creditors' committee has asked for 1,500 loan files for their
7 sampling expert. And there was a dispute as to whether all
8 1,500 were supposed to be produced before today, whether
9 they've now been produced or not, but that's just -- I give
10 that just as an example. There's an enormous amount of work
11 being done. And are you telling me the bankruptcy judge can't
12 say you, FHFA, you can't get your discovery now because of
13 everything that's going on and has to happen in this case very
14 soon. I'm not telling you, FHFA, that you're not going to be
15 entitled to discovery from the debtors. But I, as the judge
16 responsible for this Chapter 11, am telling you you're not
17 getting it now. You're saying that's beyond my power to do.

18 MR. GLENN: Let me start on a more general level, and
19 I'll try to finish there. I think Your Honor posited the
20 question, the more general question, how can the Court regulate
21 discovery -- third party discovery in a complex -- an important
22 Chapter 11 case, such as this, such that that discovery doesn't
23 derail the fundamental purpose of Chapter 11. And I think
24 there are plenty of cases out there that stand for that
25 proposition. And I think that would be underpinning of Your

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

100

1 Honor's decision with respect to the other defendants granting
2 the Section 105 injunction dealing with potential
3 indemnification obligations, discovery, collateral estoppel,
4 res judicata. Those are all the concerns that are appropriate
5 for a Section 105 injunction. And I think that they can be
6 used to limit discovery in appropriate cases and including the
7 asbestos cases are a great example of that. Manville -- that
8 was the central holding in Manville that apart from the bona
9 fides and the merits of the litigation itself, the avalanche of
10 that litigation, including discovery obligations, would
11 restrict, if not eliminate, the company's ability to
12 reorganize. I think Your Honor has that general power and I
13 think that that power is well documented in a long string of
14 cases.

15 In this case, however -- and that's where I want to go
16 back to the beginning of what I said. I think that the case
17 has far reaching ramifications if FHFA were not involved. We
18 happen to be in the unique circumstance of being the
19 beneficiaries of this provision of --

20 THE COURT: Well, you're not exercising police power.

21 MR. GLENN: No, no. But what Judge Cote held and what
22 the Second Circuit held in Colonial Realty is that Congress,
23 for the decision -- for the reasons that we've cited in our
24 papers and in the legislative history of HERA going back to
25 FIRREA has decided that FHFA's work is so important that

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

101

1 Congress did not want that work restricted by Courts outside of
2 what HERA is litigating in the Courts in which he is reporting.

3 THE COURT: So you say that that gives FHFA a free
4 pass. If you decided that you wanted discovery that was going
5 to cost twenty million dollars, I would have no power to
6 regulate or restrict it. That's your view, correct?

7 MR. GLENN: Under HERA, I think the answer is yes.

8 THE COURT: No. Tell me is there any source of
9 authority that I have, in your view, that would permit me to
10 restrict discovery sought from the debtors in this case by FHFA
11 if the uncontroverted evidence established that the cost was
12 twenty million dollars, and it would derail a whole series of
13 matters that are currently scheduled over the next three or
14 four months?

15 MR. GLENN: I don't think Your Honor has to reach that
16 question because of what we've done.

17 THE COURT: Well, I want you to answer that question.

18 MR. GLENN: I'm going to. The answer is no. Your
19 Honor does not have that power.

20 THE COURT: Okay.

21 MR. GLENN: And I'm not here to make any value
22 judgments on that. I'm not here to say it's right or wrong. I
23 think that as a matter of statutory interpretation, starting
24 with Colonial Realty and Judge Cote's opinion the --

25 THE COURT: Even though -- let's assume I agree with

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

102

1 you that under Colonial Realty, I can't -- I couldn't -- I
2 mean, the reference was withdrawn with respect to FHFA so it's
3 not an issue for me, as far as I'm concerned. I know it's
4 being appealed, but that's -- it's just not my issue. And what
5 I'm really asking is not an injunction against FHFA. It is an
6 order that says, in substance, that 362(a) is hereby extended
7 so that discovery in third party actions may not be obtained
8 from the debtors absent further order of the bankruptcy court.
9 It is not specific to FHFA or FDIC. You know, there are 1900
10 plus actions pending around the country; more than that.
11 Thousands of actions pending around the country. The debtors
12 have, and they cited this, at least one stipulation where it
13 was fairly limited discovery. They stipulated, and they
14 agreed.

15 And so, again, I start with the proposition I'm not --
16 they don't get a free pass on discovery in third party actions.
17 Okay. The question is scope, context, timing, burden --
18 burden, I don't mean necessarily the dollars in costs. Those
19 are among the factors that it would seem to me -- and you said
20 I can't take any of that into account if you decided you wanted
21 twenty million dollars. If it was going to cost twenty million
22 dollars to comply, tough luck. Do it.

23 MR. GLENN: Your Honor, I think we have to divide the
24 two questions of cost and authority.

25 THE COURT: No. That's why I asked you a

RESIDENTIAL CAPITAL, LLC, ET AL.

103

1 hypothetical.

2 MR. GLENN: Okay. Your Honor, I think the solution to
3 the problem Your Honor identified is to either in this court or
4 the court in which the matter is presiding for the cost issue
5 to be resolved separately from the legal entitlement to the
6 documents.

7 THE COURT: So you would agree that I could resolve
8 the cost issue and decide that FHFA would only be permitted its
9 discovery if it posts a bond for the estimate of costs in
10 complying and those -- and as soon as that is quantified
11 precisely that those costs will be paid. Do you agree I have
12 the authority to do that?

13 MR. GLENN: I'm not going to concede that Your Honor
14 has that authority, but I will concede that that's an
15 appropriate consideration --

16 THE COURT: Well, either I have the --

17 MR. GLENN: -- that either this Court --

18 THE COURT: -- authority or I don't.

19 MR. GLENN: I --

20 THE COURT: What is your position?

21 MR. GLENN: I think that my personal view, and we can
22 go into this further separately, is that the Court --

23 THE COURT: No. We're going to do it here now. I
24 always love to talk to you, Mr. Glenn, but --

25 MR. GLENN: Well, I know.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

104

1 THE COURT: People will think we're related --

2 MR. GLENN: Ms. Leung will go into --

3 THE COURT: -- or something.

4 MR. GLENN: Ms. Leung will go into the control issue
5 and where we think the cost should end up. It's a -- I think
6 that the Court -- if we had a subpoena, a normal subpoena, the
7 Court who --

8 THE COURT: You do have a normal subpoena.

9 MR. GLENN: Well, the court out of which the subpoena
10 is issued would have the authority to determine who should pay
11 for the cost.

12 THE COURT: Okay. But let's just focus on that for a
13 minute, okay? And Rule 45 specifically --

14 MR. GLENN: Yes.

15 THE COURT: -- talks about the Court that's issuing
16 the subpoena. And so, that's not this Court; it's the district
17 court, right?

18 MR. GLENN: Correct.

19 THE COURT: Okay. With all respect to Judge Cote, or
20 any other district judge, or any of the state judges around the
21 country, or federal judges around the country that have these
22 matters, I mean, they're not really -- first off, it's not
23 their job to worry about whether these Chapter 11 cases proceed
24 expeditiously in the ordinary course. They have to worry about
25 their specific litigation. One could call it a parochial

RESIDENTIAL CAPITAL, LLC, ET AL.

105

1 interest. I think it's certainly an appropriate interest for
2 the judges. In federal court, you know, Judge Cote could
3 address the issue of cost, but that doesn't address the issue
4 from a standpoint of a debtor whether it's a Chapter 7, or 13,
5 or 11 debtor. That's a particular interest of the bankruptcy
6 court.

7 MR. GLENN: Correct.

8 THE COURT: And again, it would seem to me that when I
9 ticked off potential factors to consider, context -- you know,
10 scope, context, timing, burden, expense, those are all things
11 that a bankruptcy judge should consider. I don't know which
12 way -- the balance they come out differently in different
13 cases.

14 Just let me back up for a second. You didn't -- I
15 take it you resolved the issue about the loan tapes and
16 origination information?

17 MR. GLENN: We did, subject to an issue about the
18 confidentiality agreement.

19 THE COURT: Okay.

20 MR. GLENN: But I'm not here to --

21 THE COURT: You're going to -- right.

22 MR. GLENN: -- to deal with that, Your Honor.

23 THE COURT: Okay.

24 MR. GLENN: I think that there are a couple things I'd
25 like to observe, because we're talking both in terms of general

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

106

1 policy considerations, Your Honor, and issues -- practical
2 issues with this dispute. I think that the issue of who should
3 pay for this discovery in this dispute --

4 THE COURT: I'll get to who pays.

5 MR. GLENN: Okay. Okay.

6 THE COURT: I'll get to who pays.

7 MR. GLENN: I think that if our request were
8 unreasonable, that the scope was an issue, that the cost was an
9 issue, that the timing of production was an issue, that those
10 are practical issues that the Court has -- certainly has some
11 input on just like any other Court would --

12 THE COURT: How are --

13 MR. GLENN: -- that was --

14 THE COURT: What's the source of my authority for
15 input on that?

16 MR. GLENN: Well, you would have jurisdiction to rule
17 on those issues in the first instance.

18 THE COURT: Under what authority?

19 MR. GLENN: Under Rule 45.

20 THE COURT: I don't. I mean, Rule 45 -- it
21 specifically says the Court that issued the subpoena --

22 MR. GLENN: Well, in this case, Your Honor, the
23 district court has deferred to you. And that's what I was
24 getting to on cost. The Court wanted to hear your concerns
25 about the cost and whether this would derail the company's

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

107

1 reorganization. The Court did make those comments. I believe
2 it's in the transcript that she did want to hear from you on
3 that. And she cited the Johns-Manville case as a circumstance
4 where those were considered.

5 THE COURT: Let me ask you another hypothetical.
6 Let's assume not only that it was going to cost ten million
7 dollars for the debtor to comply, and we'll deal with the issue
8 of cost, you want the stuff -- you say -- let's say a district
9 judge, and this is not what Judge Cote has done, let's say the
10 district judge orders that this be produced -- the judge who
11 issues the subpoena says produce it within forty-five days.
12 And the bankruptcy judge who's got the case, not this case,
13 concludes that, you know, producing -- requiring the debtor to
14 produce documents at a cost of ten million dollars in the next
15 forty-five days guarantees this case is derailed and converts
16 to a Chapter 7 liquidation. The bankruptcy judge has no
17 authority to do anything about it?

18 MR. GLENN: In our --

19 THE COURT: Yeah.

20 MR. GLENN: -- particular circumstance --

21 THE COURT: FHFA is the plaintiff or FDIC and says,
22 got to produce this document within forty-five days. It's
23 going to cost ten million dollars. And the debtor comes in
24 with uncontroverted evidence that complying with that subpoena
25 would result in conversion of the case to Chapter 7

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 108

1 liquidation. Bankruptcy has no power -- the bankruptcy court
2 has no power to do anything about it.

3 MR. GLENN: It's funny, Your Honor. If I were here
4 about nine months ago when I represented Borders, I might have
5 a different viewpoint of that --

6 THE COURT: Really?

7 MR. GLENN: -- case. Yes. But what I have to say is,
8 I have to start from the text of HERA. And the text of HERA
9 says that no court can issue any order enjoining or limiting
10 FHFA's activities. So I think we have to draw the line between
11 what is a regulatory -- a discovery burden weighing exercise
12 versus what is -- a court throwing down the gauntlet and
13 saying, no, I'm not infringing -- you don't get it, and I'm not
14 infringing on FHFA.

15 THE COURT: You don't get it now.

16 MR. GLENN: You don't get -- well, that question
17 straddles the line between --

18 THE COURT: Does it?

19 MR. GLENN: -- those two -- it does, Your Honor,
20 because if Your Honor said that it's going to -- you're going
21 to delay the debtors from producing documents for a year, and
22 we have a written discovery deadline of the end of the year.

23 THE COURT: You haven't even had to have motion
24 practice in your case. I understand. Judge Cote issued an
25 order.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

109

1 MR. GLENN: I am subject to an order. My client is
2 subject to an order today for written discovery to end at the
3 end of this year. Whether -- if the Court said you can't get
4 the documents, whether Judge Cote would default FHFA because it
5 couldn't proceed with its case at that point in time, I would
6 hope --

7 THE COURT: You know, I look with --

8 MR. GLENN: -- I would hope that she would --

9 THE COURT: I look with interest --

10 MR. GLENN: -- be flexible about that.

11 THE COURT: -- on -- I think you cited what I refer to
12 as Winnick I, Judge Lynch's decision in the district court.
13 There's also a Winnick II which is an interesting case. I
14 mean, in that Luzzano case that I had called to your attention,
15 I discussed both Winnick I and Winnick II. Winnick I, Judge
16 Lynch said you've got to produce this discovery. In Winnick
17 II, which was -- Citibank had the documents. It wasn't a party
18 to the case, and they claimed it was too burdensome. And I
19 guess Judge Lynch agreed. And so, Citibank was relieved of the
20 obligation to produce any of the documents, but Judge Lynch had
21 decided that the plaintiffs, as assignees of the claim they
22 were prosecuting, were obligated to do it. It leaves -- I
23 mean, I guess the judge could default the defendant, but that
24 was one of the twists in the Winnick case.

25 But let's say I'm not going to just stay it for a

RESIDENTIAL CAPITAL, LLC, ET AL.

110

1 year. I mean there's an auction at the end of October.
2 There's an RMBS settlement hearing scheduled for November 5th
3 which may or may not hold to November 5th. There are a whole
4 slew of things sort of between now and January that are going
5 to happen in this case where if, based on the uncontroverted
6 evidence and the record in the Chapter 11 cases, I was to
7 conclude that the debtors having to comply now with the
8 subpoena would be seriously prejudiced. It would threaten to
9 derail an important Chapter 11 case and consequently -- look,
10 what I did with respect to the 105 injunction, it runs to
11 October 31. They may come back and say they need it extended
12 for some period or not, but it isn't going to get extended
13 indefinitely. It was not an injunction. You know, and I said
14 in the one that was contested and went to decision, you know,
15 parties are free to take discovery from AFI, but not from the
16 debtors while the stay is in place.

17 So --

18 MR. GLENN: Your Honor --

19 THE COURT: I mean, I see that -- yeah. You want to
20 go the outlier the other way. Judge Cote's ordered, you know,
21 a year discovery cutoff for fact discovery, and, you know, it
22 may be you got to wait three or four months before the debtor
23 has to comply. I don't know what the appropriate period is.

24 MR. GLENN: Those are very difficult questions.

25 THE COURT: That's why I'm asking them, yes.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

111

1 MR. GLENN: And I'm obviously -- I understand that.
2 And I'm doing my best to help the Court. But ultimately, Your
3 Honor has to decide this case based on the record before Your
4 Honor. And I would point Your Honor to the Mongelluzzo
5 declarations, and I hope I haven't slaughtered that name. But
6 what is conspicuously absent from both of those declarations,
7 and it's interesting to look at the progression between the
8 two. The first one spoke to the situation before the last
9 hearing when it was up in the air exactly how much FHFA --

10 THE COURT: Well, it was 105,000 files.

11 MR. GLENN: Correct. Correct. So if Your Honor goes
12 to the supplemental Mongelluzzo declaration and goes back and
13 forth between the two, there's absolutely nothing in those
14 declarations that says that complying with our request, I
15 should say, with FHFA's request is going to somehow derail --

16 THE COURT: Well, time out.

17 MR. GLENN: -- this reorganization.

18 THE COURT: Wait a second. I mean, you say that the
19 statute prevents me from doing anything to regulate the
20 discovery by FHFA. What does it do with respect to the
21 defendants' -- the nondebtor defendants in your case, to their
22 subpoena?

23 MR. GLENN: I have no idea ,and I will leave it to
24 them to argue that.

25 THE COURT: I see. So, you know, they can't -- I

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

112

1 could say you can't get it, but FHFA I can't stop them. They
2 only want, now, 2,500, you want 43,000.

3 MR. GLENN: We don't think they want it. We think
4 that, putting aside the burden on the debtors, the process
5 here, Your Honor, is the loan files in this litigation
6 effectively have to be re-underwritten. Data's collected, a
7 person who has the capabilities of a loan officer who can
8 determine whether the loan is worthy and meets the underwriting
9 guidelines, has to reexamine them.

10 THE COURT: I think I know the answer to this
11 question, but did you and your experts seek to meet and confer
12 with the defendants' counsel to see whether the experts could
13 agree on an appropriate sampling methodology? I'm sure the
14 answer is you did and they said no, they want all 43,000 files.
15 Do I have that roughly right?

16 MR. GLENN: Not with respect to this in particular,
17 but globally there are many, many securitizations. And if Your
18 Honor were to look at the entire record of all the loan files
19 at issue and all the securitizations in dispute the number is
20 staggering, and we just don't think it's possible, not only
21 within Judge Cote's schedule, but with any reasonable schedule
22 to undertake this process.

23 So there are broader issues at play in the litigation.
24 We're trying to be reasonable. We're trying to work with the
25 Court and work with the debtor to obtain a sample size that

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

113

1 achieves our objectives with being able to prove our case with
2 minimizing and hopefully eliminating the burden on the company.

3 Some of their vendors are FHFA's vendors and there are
4 pricing and other potential efficiencies that we can take
5 advantage of. I think today the question Your Honor has to
6 decide is do we have the legal entitlement to these documents
7 and who should bear the cost.

8 THE COURT: Let me ask you this specifically. Do I
9 have the authority, under Section 105, to extend to the debtors
10 protection against discovery in any action, absent further
11 order of the Court?

12 MR. GLENN: A blanket?

13 THE COURT: Yes. It would -- in words or in substance
14 it would say that in light of the large number of lawsuits
15 pending around the country, from which discovery may
16 potentially be requested or is responsive, and in light of the
17 burden and expense to the debtors of complying with discovery,
18 in order to regulate discovery in aid of administration of
19 these Chapter 11 cases, the Court extends the protection of
20 362(a) to any subpoena or other request for production of
21 documents, from the debtors.

22 MR. GLENN: Not as against FHFA, certainly, because of
23 the reasons we've articulated. But --

24 THE COURT: Well, but that's not an injunction against
25 FHFA. It is saying in the administration of this case, and I'm

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

114

1 not saying FHFA can't get that stay lifted on conditions, but
2 it is not an injunction -- it's not an injunction against FHFA
3 proceeding with its action. It is because, I'll just use the
4 hypothetical to make it easy, I know you say that the costs,
5 particularly when you get down to 2,500 loan files is
6 substantially less, if the burden and expense to the debtor of
7 complying with discovery, it will require use of property of
8 the estate. It will affect the administration of the case, the
9 effective administration of the case, and in aid of that power
10 the Court, using 105, extends the stay, subject to further
11 order of the Court, to any discovery from the debtors.

12 That doesn't seem to me to require a 105, an
13 injunction. It's not an injunction of any outside activity.
14 In Hillsboro Holding it was depositions of present and
15 former --

16 MR. GLENN: Senior officers, right.

17 THE COURT: -- officer or employees. In Manville it
18 was, again, discovery from -- at least that decision -- Judge
19 Bryant's decision was discovery of officers and directors.

20 I understand your argument that, and I subscribe to
21 the law, that to get an injunction against any outside
22 activity, if you will, it's got to be done by adversary
23 proceeding under 7001. But 105 is utilized other than in the
24 injunction context. Just the words of the statute 105(a), "The
25 Court may issue any order, process or judgment that is

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

115

1 necessary and appropriate to carry out the provisions of this
2 title."

3 Well, the provisions of this title are intended, under
4 541, to marshal and protect the assets and the property of the
5 estate in Chapter 11 dealing with administration of the case.
6 The kind of order that I'm asking you about is designed
7 specifically not to extend powers beyond what the Code does,
8 but to apply the powers that the Code already contains to a
9 context that's slightly different.

10 MR. GLENN: I think the answer is no, Your Honor,
11 unfortunately. I think that --

12 THE COURT: Let me just say, I haven't found any cases
13 one way or the other.

14 MR. GLENN: I was going to say, I haven't heard of a
15 case that says that. I think that Rule 7001 doesn't just say
16 injunction, it says other equitable relief.

17 THE COURT: Against a third -- against some party.

18 MR. GLENN: Yes.

19 THE COURT: So if I -- look, it isn't even on -- the
20 debtors sought an injunction against FHFA, Judge Cote withdrew
21 the reference, she made a determination, no stay. I'm not
22 making any effort to second guess that.

23 MR. GLENN: I think that those are the types of
24 matters that probably have a practical solution, because what
25 Your Honor is saying that the -- given what Your Honor has

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

116

1 either taken judicial notice of or seen in a first day hearing,
2 seen in other similar complex cases, Your Honor could establish
3 guidelines that before a party can come in and get this kind of
4 discovery they would have to prove that that is not going to
5 derail the reorganization, cost -- have a cost that's
6 prohibitive or other matters so that it would be more of a
7 controlling the docket type of approach to solve a practical
8 problem. But as a blanket matter to issue an order that has
9 either a direct or indirect effect of enjoining third parties,
10 I don't think Your Honor could do that without an adversary
11 proceeding.

12 THE COURT: Address the expense issue.

13 MR. GLENN: I'm sorry?

14 THE COURT: Address the expense issue.

15 MR. GLENN: Your Honor, what I would like to do for
16 that is cede the podium to Ms. Leung on the control issue,
17 which I think is the issue which is the major issue of expense.

18 THE COURT: Okay. Fine.

19 MR. GLENN: Thank you.

20 MR. HAIMS: Your Honor, before she does if I could
21 make one quick, just, note.

22 THE COURT: I can't hear you, Mr. Haims.

23 MR. HAIMS: Oh, I'm sorry.

24 Before she starts I just want to make one quick point.
25 We just got an e-mail that the Second Circuit has stayed the

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

117

1 FHFA case, has issued an order today, and that it's going to be
2 pending full briefing on the motion for a stay, which is going
3 to be heard on September 25th. I just wanted to bring that to
4 your -- we just got an e-mail, and I wanted to bring that to
5 the Court's attention.

6 THE COURT: Okay. All right. Thank you. We'll
7 continue on though. Go ahead, Ms. Leung.

8 Can I -- let me just before -- the application that I
9 understood was before the Second Circuit was in the UBS case.

10 MR. HAIMS: The application was by UBS for all of the
11 FHFA cases.

12 THE COURT: For all of them? Okay. All right. Go
13 ahead, Ms. Leung.

14 MS. LEUNG: And I just wanted to address that briefly.

15 As we set forth in our letter response yesterday,
16 regardless of the UBS appeal, this case was still go forward.

17 THE COURT: Just pull the microphone a little closer.

18 MS. LEUNG: This case would still go forward, because
19 there are fraud and aiding and abetting fraud claims again --

20 THE COURT: Not if the Second Circuit stays it, it
21 won't.

22 MS. LEUNG: Right. But that's not an issue that --
23 the legal issue that's before the Court. So --

24 THE COURT: No, I -- it may be that the issue before
25 the Second Circuit is a narrower one, but if they stay the case

RESIDENTIAL CAPITAL, LLC, ET AL.

118

1 the case is stayed, but we'll see what they order.

2 Go ahead.

3 MS. LEUNG: Okay. Before I get to the control issue I
4 do want to clarify something for the record. Before Your Honor
5 was speaking in terms of Rule 45 subpoenas. In fact there is
6 not a Rule 45 subpoena against the debtors. There may be some
7 confusion because several years ago, I believe in 2010, FHFA
8 issued a number of subpoenas to different servicers including
9 RFC and GMAC Mortgage LLC, which does cover loan files. So
10 there is an outstanding subpoena to the debtors, but it wasn't
11 in the context of the litigation, and it wasn't issued out of
12 the district court as part of the litigation.

13 THE COURT: So you're telling me there's no
14 outstanding -- I mean, they're not a party to your action,
15 correct?

16 MS. LEUNG: Correct.

17 THE COURT: And therefore, in order to take discovery
18 from them you have to proceed by Rule 45?

19 MS. LEUNG: Well, not exactly, Your Honor. We are in
20 an odd procedural posture because of the way that we got here,
21 and I think we've been very clear that FHFA's position is that
22 Ally has control over the loan files and various other
23 documents. Ally should be producing those documents as part of
24 party discovery, whether or not it's actually in the possession
25 or custody of the debtors, and that Ally should bear the costs

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

119

1 of that production as a party. And our understanding is that
2 Judge Cote wanted you to decide the bankruptcy issues in the
3 first instance, but we've always tried to get these documents
4 through party discovery, not third party discovery.

5 THE COURT: Okay.

6 MS. LEUNG: And the papers that were submitted by the
7 debtors don't -- or Ally, don't undercut that position at all
8 and that only confirms our position, as set forth in our
9 papers, that Ally does have control over the loan files.

10 As Your Honor correctly seized upon the last time we
11 were here, the relevant legal issue is whether Ally has access
12 or the ability to obtain the documents and the shared services
13 agreement is clear on that front.

14 The record services statement of work is clear on its
15 face that it covers litigation requests, and it's also clear
16 that it covers loan files. In fact, in paragraph 28 of the
17 Mongelluzzo supplemental declaration, the debtors concede that
18 as part of records services they provide loan files to Ally
19 upon request.

20 It's also clear, on the face of the agreement --

21 THE COURT: They just didn't think that 5,000, 2,500,
22 104,000, 42 -- 43,000 would have to be produced at one time?

23 MS. LEUNG: Maybe, maybe not. I can't speak to that.
24 But it is clear, on the face of the agreement, that ResCap does
25 not have discretion to turn down a request. In Section 6(b) it

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

120

1 says "During the term of the statement of work ResCap will
2 provide all services under the terms and conditions of the
3 statement of work." And ResCap argues that despite the plain
4 words of the statement of work that other provisions of the
5 agreement support their conclusion that they're not required to
6 produce the loan files. For example, they argue that the
7 timeframe for responding to requests is a day turnaround and if
8 the parties had contemplated a request for thousands of loan
9 files, that that would make no sense.

10 But in fact ResCap bargained for more time to complete
11 services and for more staffing in Section 7(a)(5) of that
12 statement --

13 THE COURT: Give me that section again?

14 MS. LEUNG: 7(a)(5) --

15 THE COURT: Uh-huh.

16 MS. LEUNG: -- of the statement of work under
17 performance standards it says, "Any references to established
18 timelines herein refers to Exhibit D. ResCap may change such
19 established timelines and will provide AFI with an updated
20 Exhibit D. To the extent there are material changes in
21 ResCap's established timelines, ResCap and AFI shall work
22 towards establishing mutually agreeable timelines."

23 In addition, in Section 7(b)(1), Remediation
24 Processes, it provides for additional staffing. It says, "If
25 ResCap reasonably determines that there is inadequate staffing

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

121

1 or staffing that lacks necessary training or skills to meet the
2 service level agreements set forth in Section 7(a), AFI agrees
3 to work reasonably with ResCap to address any such deficiencies
4 in staffing or skill sets."

5 So the agreement, on its face, provides for
6 contingencies such as large order requests for documents. So
7 their -- the provisions they cite that say -- that they argue
8 undercut a plain reading of the statement of work, we think
9 don't support that reading, in fact quite the opposite that
10 they bargained for and gave themselves maximum flexibility for
11 things -- for unforeseen circumstances like a large request for
12 loan files. We think that that's clear on its face.

13 As for the fee structure, the parties -- ResCap and, I
14 think, Ally also concedes that the agreement provides for Ally
15 to pay for services. So even though there's a basis --

16 THE COURT: I had some question whether they're
17 limited to that 50,000 dollars for document production services
18 versus potentially millions that it's going to cost to do it.

19 MS. LEUNG: But I think the debtors clearly -- I think
20 the agreement clearly states that the pass-through costs would
21 be absorbed by Ally. So it appears that most of these pass-
22 through costs would be the costs of the vendor to retrieve the
23 documents and not actually ResCap costs or personnel time or
24 labor in terms of identifying the loan files. That most of
25 that cost is actually in the retrieval.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

122

1 THE COURT: Is there anything in the shared services
2 agreement or the statements of work that -- let's assume that
3 AFI requested ResCap to produce 43,000 loan files, is there
4 anything in the shared services agreement or the statement of
5 work that addresses how quickly ResCap would have to comply
6 with the request?

7 MS. LEUNG: Other than what I just read into the
8 record, not that I'm aware. It just gives them flexibility to
9 do it in more time than what's in Exhibit D.

10 THE COURT: Okay. So that, for example, if Judge Cote
11 ordered Ally to produce 43,000 loan files and this Court
12 determined that yes they should produce it over a different
13 timeline, beginning ninety days from now when things settle
14 down in the case and setting out reasonable parameters as to
15 when it should be done, is there anything in the shared
16 services agreement or the statements of work that would limit
17 this Court's ability to set out that timetable?

18 MS. LEUNG: Not that I'm aware.

19 THE COURT: Okay.

20 MS. LEUNG: Also, for the shared services agreement we
21 have pointed out the legal services statement of work and the
22 reason we think that that also supports ResCap's obligation to
23 provide loan files, is it shows that ResCap is required to
24 facilitate access to documents and --

25 THE COURT: Let me put it -- let me just stop you

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

123

1 there; I'll let you go on. I've actually read these pretty
2 carefully.

3 MS. LEUNG: Okay.

4 THE COURT: I think you have the much stronger side of
5 the argument on the point of whether -- I don't think you
6 can -- I mean, it's -- I don't think I can order Ally to
7 request the documents; I think Judge Cote could. I don't think
8 if I said produce them under these documents that ResCap would,
9 as a result of my order that they produce them, would trigger
10 the response -- the obligation of Ally to pay for it.

11 I think if -- I mean, I approved the entry into the
12 shared services agreement. I believe I can, therefore -- it
13 was presented to me by AFI and the debtors and I approved it
14 and I believe I can have the power to interpret it. If Judge
15 Cote ordered them to it and they -- and she directed them to
16 forward that request to the debtors, I think she could
17 certainly deal with, to the extent necessary, the cost issue.
18 I think if she ordered them to do it, I think, since I approved
19 this agreement I could interpret it, hypothetically, as saying
20 okay you've got to do it, Ally's got to pay for it under these
21 sections.

22 But I'm -- you can gather from my colloquy with Mr.
23 Glenn that my focus isn't so much whether documents have to be
24 produced but when they have to be produced and who bears the
25 cost of having to do it. Those are -- you know, I haven't

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

124

1 decided any of this at this point but those are my principal
2 concerns.

3 I just -- they're in court several times a week and we
4 have this very, very full docket, all front-loaded in this case
5 between now and the end of this year. It may spill over into
6 early next year. There'll be stuff that obviously goes on
7 after that but we are jam-packed with very time-intensive
8 things that are going on, such that having to comply in the
9 next sixty days with -- you say, well, you're only asking for
10 2,500 now; the other side in your cases want 43,000, a much
11 heavier burden from it.

12 The task of complying -- I don't think one side should
13 get its discovery and the other side get shut out. So it's as
14 much an issue -- what's the scope of the request, what's the
15 context in which it's being asked, what's the timing, what's
16 the burden, what's the expense, those are the things that I'm
17 focused on.

18 I'll let Mr. Haims address the issue. I'm not -- I'm
19 taking this under submission today. I think you've got the
20 much stronger side of the argument about what this shared
21 services agreement requires ResCap to do if AFI asks for it.
22 That request hasn't been made yet. And Judge Cote could order
23 AFI to request the documents from ResCap.

24 I think the issue that the debtors have raised and
25 Ally -- AFI raised it in their filing here, I don't care who

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

125

1 owns the stuff. It doesn't make any difference who owns this
2 data or the documents. That's a red herring issue as far as
3 I'm concerned.

4 MS. LEUNG: Well, we agree with that. I think that
5 where it would be helpful is for -- an interpretation of this
6 agreement would be helpful to the district court because of
7 AFI's position that they can't ask or do anything or take
8 copies of the documents, for some reason, because of the
9 bankruptcy stay. That is the position that they have set forth
10 in terms of objecting to our document requests and in the
11 district court, that the automatic stay prevents them from
12 getting copies of these documents.

13 So we have stated very clearly we think that the
14 shared services agreement is a method by which they can request
15 the documents that Your Honor has already ruled on that.

16 THE COURT: Well, I know Mr. Glenn disagrees with my
17 view that 105 is a potential -- I'm not deciding it yet -- the
18 potential source of power for the Court to say no discovery
19 absent further order of this Court from the debtors. The
20 shared service agreement, not to the contrary notwithstanding, and
21 even though that agreement was entered into post-petition,
22 approved post-petition, I think I would still, under my
23 analysis, have the ability to regulate AFI's discovery from the
24 debtors as well.

25 Again, none of this is to say that -- I mean, I've

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

126

1 said it already. Okay. Anything else?

2 MS. LEUNG: Well, to the extent that the stay does
3 apply, Your Honor already did rule on that issue when you
4 approved the shared services agreement. There is a -- I don't
5 have it in front of me but there is a paragraph in that order
6 that says that the stay is lifted to the extent necessary to
7 fulfill the shared services agreement.

8 So to the extent that it does apply --

9 THE COURT: So you'd say I would have -- your view is
10 I would have no -- if ResCap said look, we've got twenty-seven
11 similar lawsuits pending against us, Ally says we've got
12 twenty-seven similar lawsuits pending us around the country.
13 It involves not 43,000 loan files; it involves 105,000 or
14 200,000 loan files, every loan file that ResCap has control
15 of -- possession of -- let's put control aside -- we need them
16 and we need them in the next sixty days, you don't think I
17 would have the power to say not so fast?

18 MS. LEUNG: Well, I'm out of my element when it comes
19 to bankruptcy law, but I believe that Your Honor ruled on the
20 basis of Section 105 as to discovery in those cases and that
21 does not apply to FHFA.

22 THE COURT: Until October 31st. Well, it's -- okay.
23 Thank you, Ms. Leung.

24 MS. LEUNG: Thank you.

25 THE COURT: Mr. Haims?

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 127

2 Let me raise a couple other questions with you, while
3 you come up.

4 MR. HAIMS: Oh, sure.

5 THE COURT: I'll listen to your argument. I mean, I
6 thought -- I was not particularly taken by the factual showing
7 that you made as to the -- your vendors don't have to provide
8 more than 1,500 files a month and it's going to take thirteen
9 months or thirteen years or you figure it out to provide it. I
10 mean, you're -- the showing you made is without additional cost
11 they wouldn't produce more -- there is no judge that I know who
12 would give you several years -- let's assume that they could
13 take discovery, okay? There's no judge I know who would say
14 okay, it may take you a year or two to produce the documents
15 because your vendor is only under contract to do 1,500 a month
16 without additional expense. So that's unpersuasive.

17 I mean, you seem to have acknowledged, but not really
18 addressed, that you have the ability to request much more
19 expedited but costly service. The issue of who pays for it is
20 a different issue, okay. How quickly -- tell me this, Mr.
21 Haims, if you had to produce 43,000 loan files and somebody
22 else was going to pay for it, so cost is not an issue, how
23 quickly could you produce them?

24 MR. HAIMS: As we say in the papers -- in the
25 documents, it's going to be nine months.

Now, we don't control --

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

128

1 THE COURT: Mr. Haims, I can't believe that. I

2 just --

3 MR. HAIMS: We don't control the vendors. We can ask
4 the vendors. You're right, that we -- there's additional --

5 THE COURT: Oh, they'll be more than happy to provide
6 expedited service at a substantial cost.

7 MR. HAIMS: Well, but there are lots of other
8 productions going on at the same time. So this is not the only
9 -- this is not a standalone production. Things are different,
10 for example, when the MBIA case was done several years ago --

11 THE COURT: Why was it different?

12 MR. HAIMS: This was pre-bankruptcy. We didn't have
13 all of the other loan file pulls that we were doing now, the
14 governmental reviews, the committee reviews, the due diligence
15 on the sales, none of that. So we haven't gotten the list of
16 loan files. We don't know where those loan files are. We
17 don't know in how many warehouses they're housed in. We don't
18 know in what states. We don't know whether east coast, west.
19 We don't know any of that at this point in time.

20 THE COURT: Okay. And tell me this --

21 MR. HAIMS: So it's hard to say --

22 THE COURT: -- if FHFA gives you a list -- let's put
23 FHFA aside. The other defendants in the FHFA cases give you a
24 list of 43,000 loan files, what do the debtors have to do to
25 determine where the files are?

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

129

1 MR. HAIMS: The debtors have to run those 43,000 loan
2 numbers through fourteen databases, find out -- that will pull
3 up where those loan files --

4 THE COURT: How long is it going to take to do that?

5 MR. HAIMS: What we estimate, it's going to be about a
6 day of processing for each database. These are batch --

7 THE COURT: How many databases are there?

8 MR. HAIMS: Fourteen.

9 THE COURT: Okay.

10 MR. HAIMS: And then --

11 THE COURT: They can't be run simultaneously in
12 fourteen databases?

13 MR. HAIMS: Mr. Mongelluzzo can talk better than I can
14 about that. But the answer -- I understand the answer is --

15 THE COURT: Do you know the answer to that?

16 MR. HAIMS: I understand the answer to that is no.

17 THE COURT: Why not? Is he here?

18 MR. HAIMS: He is here.

19 THE COURT: Ask him the question.

20 MR. HAIMS: Sure.

21 THE COURT: I want to know how long -- if you -- for
22 43,000 loan files can searches of four databases --

23 MR. MONGELLUZZO: Fourteen.

24 MR. HAIMS: Fourteen.

25 THE COURT: -- fourteen databases, can they be run

RESIDENTIAL CAPITAL, LLC, ET AL.

130

1 simultaneously?

2 MR. MONGELLUZZO: There's two issues, Your Honor. One
3 is that we would -- they -- some of the loans are in some
4 databases and some are in others. So until you exclude it from
5 the first database you don't move to the second. It's just the
6 way the IT batching process works, and I'm not an IT expert so
7 I can't explain to you why we have those system constraints.
8 We're dealing with multiple systems that are legacy systems.
9 So whenever we've had to do large searches like this, i.e. the
10 MBIA case, it basically takes us three to four weeks to go
11 through all of that processing and do all the reconciliation
12 till we can finally tell you exactly where everything is.

13 THE COURT: Okay. Thank you. Thank you very much.

14 So let's say it takes two weeks to figure out where
15 the loan files are. Then what does it take to get them back?

16 MR. HAIMS: You've got to ask the vendors.

17 THE COURT: Okay.

18 MR. HAIMS: The vendor's got to pull them.

19 THE COURT: And do you have -- I mean, vendors -- my
20 experience is that the vendors have -- you have a contract, and
21 I understand it limits the number that they have to do. But
22 they've got a cost sheet, and my recollection is the cost --
23 the more quickly you need it, the greater the cost. And so if
24 after you identify the location in your fourteen databases,
25 where the location of those files are, I don't know how many

RESIDENTIAL CAPITAL, LLC, ET AL.

131

1 vendors we're talking about.

2 MR. HAIMS: Primarily two --

3 THE COURT: Okay.

4 MR. HAIMS: -- but it could be more.

5 THE COURT: Your two vendors, if you told them we need
6 all of those files in a month, they would quote you a cost for
7 providing the expedited service of getting those files. Mr.
8 Glenn said, what, sixty days, was that the period you were --

9 MR. GLENN: Yes.

10 THE COURT: Okay. If you said we need the 43,000
11 files in sixty days, your two -- Iron Mountain is one of them?

12 MR. HAIMS: Yes.

13 THE COURT: And who's the other?

14 MR. HAIMS: Kenwood, I believe.

15 THE COURT: Okay. Iron Mountain will give you a quote
16 for retrieving, I don't know, whatever the number is that's
17 with them and it'll be quantified as a dollar amount and it'll
18 be expensive, but they'll give you a quote. It won't take nine
19 months to do it. Am I right or wrong?

20 MR. HAIMS: Assuming they're doing nothing else, and
21 again these are not necess -- this has never been done, as I
22 understand here, so with -- by the debtors.

23 THE COURT: Oh, really?

24 MR. HAIMS: By the debtors.

25 THE COURT: Oh, well by the debtors.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

132

1 MR. HAIMS: By the debtors.

2 THE COURT: Do you know how often --

3 MR. HAIMS: Yeah.

4 THE COURT: -- Iron Mountain is one of the main
5 document --

6 MR. HAIMS: Agreed.

7 THE COURT: -- retention -- multiple facilities in the
8 country and how often in complex litigation they're getting
9 requests? They love it because they can charge an arm and a
10 leg for doing it.

11 MR. HAIMS: I mean, again, Mr. Mongelluzzo could
12 probably just talk about it better. Sure. You're going to pay
13 them whatever you want to drop everything else. These are not
14 only our vendors, our documents are stored with other servicers
15 and other companies. Could they do it quicker? I would assume
16 so. For any price someone will do something quicker.

17 THE COURT: Okay. So I am directing the debtors to
18 obtain a quote from their vendors for retrieving 43,000 loan
19 files sixty days -- within sixty days after the vendors get the
20 request. Okay. You say it's going to take you two weeks to do
21 it, to identify where they are, I don't know, you can probably
22 make some rough allocation how many Iron Mountain has and how
23 many your other vendor has, you can approximate it. But I want
24 to see what the cost is for doing that. Okay. I don't want to
25 find out it's going to take nine months because it's not. It

RESIDENTIAL CAPITAL, LLC, ET AL.

133

1 isn't going to happen.

2 I can tell you, if I rule for FHFA and this matter
3 goes back to Judge Cote, do you think she's going to give you
4 nine months to produce the documents? I don't think so.

5 MR. HAIMS: Okay, Your Honor. We will do that. When
6 would you like that?

7 THE COURT: Within a week.

8 MR. HAIMS: Okay. Can I just confirm with my client?

9 THE COURT: Yeah. In other words, I'm not asking you
10 to figure out where the loan files are now, I'm not asking you
11 to run the fourteen databases. What I'm asking for you is to
12 get quotes from your two vendors of what the cost would be of
13 retrieving files within a sixty-day period after you identify
14 them.

15 MR. HAIMS: Can I consult before I agree with it?

16 THE COURT: Yes, go ahead. Yeah.

17 MR. HAIMS: Okay.

18 (Pause)

19 MR. HAIMS: Mr. Mongelluzzo raises two concerns. One
20 is, he doesn't know whether they would do it and get us a quote
21 within a week. But more importantly, he thinks they're going
22 to come back and say unless we know where the files are, we
23 can't -- because there are multiple locations, unless we know
24 how many files we have and where they're located we can't do
25 it. We can ask them.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 134

1 THE COURT: How many locations? Do you decide where
2 the files go?

3 MR. HAIMS: My understanding is no. But we could ask
4 them for that information, Your Honor.

5 THE COURT: Okay. I want you to ask them.

6 MR. HAIMS: Okay. We will do that.

7 THE COURT: And I want a written response.

8 All right. Go ahead. You have a reply that you want
9 to make?

10 MR. HAIMS: Yeah. So I don't think that the anti-
11 injunction provision is applicable here. We are not saying --

12 THE COURT: 105 is not an anti-injunction -- is not an
13 injunction.

14 MR. HAIMS: No, no. I'm sorry, the hearing anti-
15 injunction provision.

16 THE COURT: Okay.

17 MR. HAIMS: We have not said no discovery ever. We
18 haven't said that for anybody, in fact for -- we've given some

19 discovery to some parties, and what we're saying -- we're not
20 asking this Court for an injunction enjoining their case.

21 Their case, to the extent the Second Circuit allows it to go
22 forward, is going to go forward -- is going forward and is not
23 going to be impeded other than the deadline for document
24 production in that one case will slip. Other than that, the
25 case itself is not being impeded.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

135

1 This is no different, I submit, to the order from
2 Judge Cote at the outset of the case, as I understand, staying
3 certain parts of the Ally case pending a decision on the motion
4 to dismiss in the UBS case. And I don't think it's any
5 different than Judge Cote issuing an order putting the Ally
6 case in tranche 4 for trial three years down the road versus --
7 behind the UBS --

8 THE COURT: Yes, but Judge Cote gets to decide that,
9 not me.

10 MR. HAIMS: Agreed. But the FHFA --

11 THE COURT: Put it this way, if -- for example, if I
12 ruled that FHFA can't get the discovery for six months, just
13 hypothetically, and Judge Cote says that's all well and good; I
14 order that they produce all the documents in sixty days; if
15 they don't I'm going to enter their default. That's, kind of,
16 like Winnick II (ph.). Do you know what -- have you read
17 Winnick II?

18 MR. HAIMS: No. But -- I suspect --

19 THE COURT: I mean, I don't have any control over what
20 Judge Cote does with respect to Ally; that's for her to decide.

21 MR. HAIMS: Agree, Your Honor. What we're saying here
22 is that I disagree with Mr. Glenn's position that you are
23 powerless to not grant their motion here because of --

24 THE COURT: I want to see him argue that in the next
25 case he comes in.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

136

1 MR. HAIMS: -- because of the anti-injunction
2 provision. Because we haven't said -- we are not asking you
3 here to enjoin their case. They have hundreds of subpoenas,
4 they and the underwriter defendants, to get the same loan
5 files. They already have hundreds of thousands of loan files;
6 they may even have some of these.

7 THE COURT: Let me stop you a second. Are you
8 suggesting that somebody other than the debtors have these loan
9 files?

10 MR. HAIMS: It's certainly possible that other debtors
11 have -- that people other than the debtors have copies of these
12 loan files. Yeah, that's correct.

13 THE COURT: Other than speculating about it, do you
14 have any --

15 MR. HAIMS: No, because we don't know -- I don't have
16 a list of the loan files they're looking for.

17 THE COURT: Well, do you know what the 43,000 loan
18 files that the non-Ally underwriters are talking about?

19 MR. HAIMS: Do I have a list of those? No, Your
20 Honor.

21 THE COURT: Have you made any effort to ascertain what
22 loan files they're talking about? They're specific
23 securitizations, right?

24 MR. HAIMS: Uh-huh. Uh-huh.

25 THE COURT: You don't need them to tell you what the

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

137

1 loans are that are in those securitization trusts?

2 MR. HAIMS: To find the loan files, Your Honor. The
3 loan files --

4 THE COURT: Not to find the loan files.

5 MR. HAIMS: The record -- again, Mr. Mongelluzzo is in
6 charge of records. The files are not stored or sorted even by
7 securitization. So is it possible that there are loans in the
8 securitization that we no longer have the files for? Sure.

9 THE COURT: It's pure speculation.

10 MR. HAIMS: Pure speculation, sure. But all of this
11 is until we see what the loans actually are that want.

12 THE COURT: Okay. You know, under Rule 45 or even
13 Rule 34, one of the factors for the Court to consider is
14 whether the documents could be obtained more easily from
15 another party.

16 MR. HAIMS: Uh-huh.

17 THE COURT: That's for Ally to argue with Judge Cote.

18 All right. Go ahead.

19 MR. HAIMS: So we don't think the anti-injunction
20 provision has any bearing on this issue.

21 Secondly, to say that this is only limited to 2,500
22 now or 5,000 is --

23 THE COURT: All they're asking for is 2,500.

24 MR. HAIMS: In their motion papers they specifically
25 reserve the right to ask for all 43,000. They've -- in

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

138

1 communication with Judge Cote, and this is part of our
2 exhibits, have asked for -- said that they're going to be
3 asking for all e-mails and they're going to be asking for all
4 of the documents. That dispute has already been teed up before
5 Judge Cote and they specifically said they're going to -- they
6 want those documents from the debtors.

7 THE COURT: Do you have all of Ally's e-mail files?

8 MR. HAIMS: There are custodians in the case. There
9 are, I think, thirty -- from the communications that we've
10 read, there are thirty some-odd custodians in the case from
11 which they want documents.

12 THE COURT: You know, I've got enough problems with
13 this current one.

14 MR. HAIMS: Right.

15 THE COURT: When the next one comes before me I'll
16 deal with that.

17 MR. HAIMS: Well, but to say that this is limited only
18 2,500 I don't think is the case. And I think we have to look
19 to see what's -- whether the granting of these 2,500 leads to
20 the next 43,000 and the next e-mail and when the other --

21 THE COURT: Well, that's why I ask --

22 MR. HAIMS: -- twenty-seven cases --

23 THE COURT: That's why I asked Mr. Glenn just assume
24 that complying with discovery is going to cost ten million
25 dollars and tank the case if it has to be done within a

RESIDENTIAL CAPITAL, LLC, ET AL.

139

1 schedule, he adheres to his absolutist position that I have no
2 power to alter that.

3 MR. HAIMS: I disagree with that position. And then,
4 I guess, the last --

5 THE COURT: That wasn't quite what he said. Close.
6 Close.

7 MR. HAIMS: And then the last provision -- the last
8 point I would just make is on the shared services agreement.
9 We have not taken the position that Ally, if they asked for
10 documents under the shared service agreement for the loan
11 files, they couldn't get them.

12 What we've taken the position is that would be an
13 additional service that would have to be negotiated. There's a
14 specific provision in the agreement that says if it's a service
15 not covered by the agreement, the parties could sit down and
16 negotiate --

17 THE COURT: Producing loan files is covered by the
18 agreement, isn't it?

19 MR. HAIMS: Well --

20 THE COURT: Yes or no?

21 MR. HAIMS: Producing small numbers of loan files --

22 THE COURT: Does it say that?

23 MR. HAIMS: -- in the ordinary course of business.

24 THE COURT: Does it say that? Does it say small
25 numbers of loan files in the ordinary course of business?

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

140

1 MR. HAIMS: Well we think, and that's why we put in
2 the --

3 THE COURT: No. Just say it: does it say that?

4 MR. HAIMS: Does it specifically say?

5 THE COURT: Yeah.

6 MR. HAIMS: It says -- no.

7 THE COURT: Okay. Just go over the fee structure
8 because I was a little unclear about -- are you capped at
9 50,000 dollars a month?

10 MR. HAIMS: For the fixed monthly costs, it's capped
11 at 50,000 dollars for the record services, yes. And that's for
12 pulling the loan files and all of the other enumerated records.

13 THE COURT: You pass through any third party costs?

14 MR. HAIMS: Third party costs, correct.

15 THE COURT: So if Iron Mountain charged three million
16 dollars, that would be a pass-through cost --

17 MR. HAIMS: That's correct.

18 THE COURT: -- under the shared services agreement?

19 MR. HAIMS: Correct. The 50,000, as I understand it,
20 deals with the time of the in-house employees to pull those
21 files.

22 THE COURT: And if Morrison & Foerster put thirty
23 paralegals and twenty lawyers the task of reviewing those files
24 before they were produced, that would be passed-along cost?

25 MR. HAIMS: That's correct.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

141

1 So what we're saying is there is provision in this
2 agreement; this is just not covered by it.

3 THE COURT: Does Ally disagree with what you and I
4 just said?

5 MR. HAIMS: I'd let Ally speak to themselves on that
6 one.

7 THE COURT: Okay. All right. Anything else before I
8 hear from Ally's counsel?

9 MR. HAIMS: No, Your Honor.

10 THE COURT: Thank you, Mr. Haims.

11 MR. BROWN: Your Honor, I'll take that as my cue.

12 Judson Brown from Kirkland & Ellis on behalf of Ally.
13 And I just want to address, for a moment, the record services
14 statement of work that you've been discussing with FHFA and the
15 debtors' counsel here.

16 It's our view that that statement of work is clear and
17 does not cover a request for the loan files at issue here, and
18 let me read a provision from that --

19 THE COURT: Go ahead.

20 MR. BROWN: -- statement of work for you.

21 In section 7(a), Your Honor, the final paragraph of
22 that section of the statement of work, the third sentence reads
23 as follows: "In addition, any deliverables in this statement
24 of work must be consistent with historical practice and
25 services provided must be delivered with the same standard of

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

142

1 care, diligence, priority and frequency with which the services
2 were provided immediately prior to the date hereof."

3 THE COURT: Let me ask you this, as AFI been a
4 defendant in any litigation in the past involving any loans?

5 MR. BROWN: Other than the FHFA lawsuit, Your Honor?

6 THE COURT: Yes.

7 MR. BROWN: Has AFI?

8 THE COURT: Yes.

9 MR. BROWN: Sure.

10 THE COURT: Okay. And in any of those litigations,
11 prior into the entry into the shared services agreement, did
12 you request production of loan files from the debtors?

13 MR. BROWN: Pursuant to this statement --

14 THE COURT: No.

15 MR. BROWN: -- of work or generically?

16 THE COURT: No, no, no, generic. Did you -- in other
17 words, you acknowledged that AFI has been a defendant in
18 lawsuits involving mortgage loans and underwriting loans and
19 all that, correct?

20 MR. BROWN: AFI has been a defendant in those types of
21 lawsuits.

22 THE COURT: And in any of those lawsuits, before the
23 shared services agreement was entered into, did AFI request
24 that any of the now debtors pull the loan files for them to
25 review?

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

143

1 MR. BROWN: For AFI?

2 THE COURT: Yes.

3 MR. BROWN: No, Your Honor.

4 THE COURT: Never?

5 MR. BROWN: No, Your Honor. This record services
6 statement of work, Your Honor, is meant to cover loan files for
7 Ally Bank, not for AFI. Separate and different. And
8 historically the request for those loan files has been small in
9 nature, nothing like the ones --

10 THE COURT: I don't want to know whether they're small
11 in nature because until the litigation bomb exploded on the
12 mortgage servicing and origination business, of course they
13 were small in number. But that changed; changed before this
14 bankruptcy.

15 MR. BROWN: Right. But just to track the language of
16 this record service, consistent with historical practice,
17 Ally -- AFI has never made a request of this sort. And so at
18 best, Your Honor --

19 THE COURT: Yeah, but the statement of work
20 specifically covers -- I don't have the words open in front of
21 me but basically is litigation support.

22 MR. BROWN: At best, Your Honor, this statement of
23 work is ambiguous. What this discussion reveals is this
24 statement of work, at best, is ambiguous as to what it covers
25 and thus the testimony that the debtors have offered, from the

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

144

1 various witnesses, particularly to the intent behind the shared
2 services agreement and this statement of work would thus be
3 relevant for Your Honor to consider.

4 THE COURT: You know, at the point where -- how many
5 lawsuits was AFI a defendant in involving origination or
6 servicing of loans at the time these debtors filed their
7 Chapter 11 petitions?

8 MR. BROWN: Your Honor, off the top of my head I don't
9 know that number for you right now.

10 THE COURT: Quite a few?

11 MR. BROWN: Your Honor, honestly I just don't know the
12 number.

13 THE COURT: Mr. Haims, I'm only able to listen to one
14 at a time, okay?

15 And you're saying AFI didn't get any document requests
16 in any of those litigations before?

17 MR. BROWN: No, and let me explain that Your Honor.
18 It's not the case that AFI was sued individually and ResCap
19 wasn't a defendant. In those --

20 THE COURT: Oh, I know they were defendants. I know
21 you were all in that same pot.

22 MR. BROWN: And so AFI didn't have to make a request
23 to ResCap for any loan files and it never did so. ResCap was
24 in the case of the defendant and it was asked to produce those
25 loan files. And so there is no historical practice to track

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

145

1 the language of this statement of work where AFI requests loan
2 files from the debtors.

3 Your Honor, I only wanted to address this --

4 THE COURT: Okay. That's fine.

5 MR. BROWN: -- particular statement of work. Do you
6 have anything else that I could answer?

7 THE COURT: No, I don't. I don't. Thank you very
8 much.

9 MR. BROWN: Thank you, Your Honor.

10 THE COURT: Mr. Haims, you wanted to be heard again?

11 MR. HAIMS: Thank you, Your Honor. I just wanted to
12 clarify that in historical precedent the -- ResCap was a
13 defendant in all those cases. In the MBIA case it was ResCap
14 who made the production itself, not at the direction of Ally or
15 to Ally or at its direction.

16 THE COURT: All right. Anybody else wish to be heard?

17 MS. MOSKOWITZ: Yes, Your Honor.

18 THE COURT: Come on up.

19 MS. MOSKOWITZ: Thank you.

20 Lauren Moskowitz, I represent Credit Suisse and I'm
21 here on behalf of the non-Ally underwriter defendants.

22 If it's appropriate for this motion, I didn't know if
23 you were setting it aside separately.

24 THE COURT: Well, I'm going to hear your motion when
25 it's on the calendar, which isn't today. But I'll -- you did

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 146
1 file in connection with this motion so I'll certainly hear you.

2 MS. MOSKOWITZ: Okay. Thank you.

3 With respect to the number of loan files at issue we,
4 as Your Honor knows from our submission, do not agree that the
5 appropriate number if 5,000, let alone the 2,500.

6 THE COURT: All right. So let me ask you this,
7 though, let's assume -- you want 43,000 loan files. Let's just
8 assume, hypothetically, that the cost of producing 43,000 loan
9 files is five million dollars. Are your clients ready,
10 willing, I know they're able but -- are they ready to advance
11 the funds against an accounting after the documents are
12 provided?

13 MS. MOSKOWITZ: Your Honor, the non-Ally underwriter
14 defendants are willing to discuss cost sharing.

15 THE COURT: No, I didn't ask whether they're willing
16 to discuss. If the Court were to order on an appropriate
17 timetable that ResCap provide all 43,000 files, are your
18 clients prepared to pay the debtors' costs, direct and indirect
19 costs, including the vendors' costs, the attorneys' time in
20 reviewing -- in producing the files, all of that costs, subject
21 to review by the Court, are they prepared to pay that cost?

22 MS. MOSKOWITZ: If FHFA is contributing and the
23 other -- all defendants are contributing, yes, Your Honor, we
24 are.

25 THE COURT: Well, Mr. Glenn only wants 2,500 files,

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

147

1 you want 43,000 and Judge Cote ordered if you want more go to
2 the bankruptcy court. So you'll soon be here asking for 43,000
3 files. Mr. Glenn, for now, is asking for 2,500. He has --
4 well, and what I wanted -- so if -- the factors that I talked
5 about earlier, including cost, are factors that the Court
6 considered, I mean even under Rule 45, which I don't -- it
7 might provide guidance to me but I didn't issue a subpoena, I
8 mean when I say I this Court didn't issue a subpoena. But one
9 of the subsections of Rule 45 deals with cost. I guess it's
10 Rule 45(b)(3)(C)(ii), (C) is specifying conditions as an
11 alternative. In the circumstances described in Rule
12 45(c)(3)(B) "The Court may, instead of quashing or modifying
13 the subpoena, order appearance or production under specified
14 conditions if the party served," and then "(ii) ensures that
15 the subpoenaed person will be reasonably compensated."

16 Now I don't think that applies, by its terms, to what
17 I have but let's assume it provides guidance to me in deciding
18 what to -- if I were to decide that 105 allows me to regulate
19 discovery from the debtors, I look to that subsection as
20 providing guidance. My specific question is, are you prepared
21 to pay the costs of the 43,000 files you want.

22 MS. MOSKOWITZ: We are prepared to share reasonable
23 costs among the defendants. Yes, Your Honor.

24 THE COURT: All right.

25 MS. MOSKOWITZ: With respect to how those should be

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

148

1 shared, however, we disagree that FHFA should be responsible
2 only for the 2,500. We're happy to talk to Judge Cote about
3 that if that's the appropriate forum to discuss allocation.
4 But we disagree with the position they're taking here today,
5 with the constant reduction in the files so that they can, I
6 think the language was, one -- so that they could do what they
7 needed to do to carry their burden, but leave no room for what
8 we need to do to carry our burden and defend against the claims
9 that they've brought. Our due process concerns are of
10 paramount concern here given that what they're effectively
11 requesting is what they want for their case but let us wait or
12 perhaps not get at all what we need for our defenses.

13 THE COURT: And that wasn't -- my question is let's --
14 I mean, timing, as I've explained, is a factor. But -- and
15 I -- you heard my expressions of skepticism about nine months
16 to produce the files. But if the debtors are required to
17 provide them, I think someone else should be paying the cost,
18 okay. It may -- it would undoubtedly take longer to produce
19 43,000 files than 2,500 files, but assuming a reasonable
20 timeframe and all that, I come back -- one thing I didn't raise
21 with Ms. Leung or with Mr. Glenn is I didn't ask whether FHFA,
22 in order to get this discovery, is prepared to agree to waive
23 any claim it wishes to file in these bankruptcy proceedings
24 because certainly the production of documents, you may need
25 them to prosecute your actions against the other defendants,

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

149

1 but I don't think there's any mistake about the fact that you
2 want them to substantiate a claim to file in the bankruptcy
3 cases against the debtors.

4 In granting the 105 injunction in the one case that
5 went to decision, I believe I identified the risk of issue
6 preclusion as an appropriate -- and the cases identify that as
7 an appropriate consideration. I don't have the 105 issue about
8 enjoining prosecution of the AFI -- the case against AFI is not
9 before me, but it does, certainly, in deciding scope context,
10 context includes whether a party wishes to -- that's seeking
11 discovery today say I need it for this other action, but do
12 they intend to use that information in the claims allowance
13 process before the Court?

14 You, on behalf of the non-Ally underwriters indicate
15 in your papers your claims for indemnification. So the same
16 factor comes into account, you want to be able to use whatever
17 information you get, not only to defend the actions -- the
18 action -- the actions before Judge Cote, but also to bolster a
19 claim that you would assert against the debtors in this case.

20 MS. MOSKOWITZ: No, Your Honor. I think the
21 indemnification is for the underwriters' legal fees and any
22 ultimate liability that they suffer. And so, to the extent
23 that we need these files to defend ourselves, we're actually
24 protecting the assets of the estate to some extent because
25 anything --

1 **RESIDENTIAL CAPITAL, LLC, ET AL.** 150

2 THE COURT: Are you entitled -- if there's a judgment
3 in the securities against your clients are you entitled to
4 indemnification?

5 MS. MOSKOWITZ: Yes, Your Honor, and we have filed a
6 proof of claim in this court.

7 THE COURT: These are 33 Act claims against your
8 client?

9 MS. MOSKOWITZ: As well as state Blue Sky Law claims
10 as well.

11 THE COURT: Okay. Well, I'm not going to reach that
12 now. But, I mean, when I'm talk about context, the context is
13 important, is the party who's seeking the discovery from the
14 debtor or the debtors' defendants in the actions before the
15 bankruptcy, have the parties seeking discovery indicated their
16 belief that they have a claim against the debtors that are
17 likely to be asserted in the claims allowance process? Those
18 are all, it seems to me, to be factors that go to the context
19 in which the discovery request rises.

20 But with all that said, I think whether the party is a
21 plaintiff or a defendant in an action outside of the bankruptcy
22 court it's entitled to the evidence to prosecute or defend the
23 claims. Timing becomes -- and burden and expense become a big
24 issue.

25 MS. MOSKOWITZ: Yes, Your Honor. And that is -- that
is appropriate for Your Honor to consider, and we're willing to

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

151

1 work with the debtors as well in working out a schedule.

2 We also would like to get these files sooner rather
3 than later, of course, because we are subject to the same
4 timing as the FHFA is in the case that's pending in front of
5 Judge Cote.

6 THE COURT: Okay. Thank you.

7 MS. MOSKOWITZ: Thank you, Your Honor.

8 THE COURT: Anybody else want to be heard?

9 MS. FREJKA: Good afternoon, Your Honor. Elise
10 Frejka, Kramer, Levin, Naftalis & Frankel appearing on behalf
11 of the committee.

12 The committee wants to echo most of the comments of
13 the Court regarding the cost, the distraction, and the timing.
14 We support the debtors in this position and feel that expedited
15 discovery, at this critical time in the case, will distract the
16 debtors from the current, very important deadlines that are
17 ahead in the coming months.

18 The committee also feels that the cost should not be
19 borne by the debtors. That these loan file expenses should be
20 borne by the defendants along the lines as just suggested.

21 THE COURT: Well, it may be -- I mean, it -- I mean,
22 Judge Cote could well decide the expenses should be borne by
23 Ally. Usually the -- by AFI, because usually with our system
24 is -- the issue for third party discovery is more acute about
25 expenses, but ordinarily the party bears its own costs for

RESIDENTIAL CAPITAL, LLC, ET AL.

152

1 discovery.

2 MS. FREJKA: And we -- the committee is aware of the
3 cost, and I think that it's probably some place between where
4 the two parties are suggesting the number is, but it does have
5 the ability to ever expand as requests expand and the committee
6 just wants to be sensitive to what those costs are and where
7 they should be allocated and passed through under the shared
8 services agreement.

9 THE COURT: Well, other than this Court deciding that
10 under the agreement that it approved that -- if the Court were
11 to decide that AFI is -- if AFI, either because it's ordered to
12 by the district court or it decides, for its own defense, it
13 needs it, requests 43,000 loan files, that the cost -- that
14 they bear the pass-through costs for providing it and perhaps
15 more than the 50,000 a month or not. And it may be appropriate
16 for this Court to decide that the one thing that's clear is
17 that the debtors shouldn't bear the cost, that under the shared
18 services agreement AFI is potentially responsible for the cost.
19 But the issue of whether AFI or FHFA, I have trouble with that
20 all the time, FHFA or the other underwriter defendants should
21 bear the cost that does seem to me to be for Judge Cote to
22 decide, not for me to decide. This is discovery in an action
23 pending before her not before me.

24 MS. FREJKA: I don't think we disagree with that. I
25 think we just raise the issue of the cost to the estate --

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

153

1 THE COURT: Okay.

2 MS. FREJKA: -- as well as the timing. And I think
3 that you've reached those same points.

4 THE COURT: I've addressed them, let's put it that
5 way.

6 MS. FREJKA: You've well addressed them.

7 THE COURT: I haven't decided them, but I've addressed
8 those issues.

9 MS. FREJKA: Yes, you have. Thank you.

10 THE COURT: Thank you, Ms. Frejka. Anybody else wish
11 to be heard? You want the last word, Mr. Haims?

12 MR. HAIMS: Your Honor, just two quick --

13 THE COURT: Okay.

14 MR. HAIMS: One is on the schedule for the additional
15 submission. Just as I was sitting here I remembered that next
16 week is Rosh Hashanah, I will not be in Monday and Tuesday.

17 THE COURT: I won't either.

18 MR. HAIMS: So if we could have it past that date,
19 Wednesday or Thursday when I get back.

20 THE COURT: I thought Friday, a week from -- I'm
21 talking about the end of next week, by Friday of next week.

22 MR. HAIMS: Thank you, Your Honor.

23 And lastly, I think we had heard from the underwriters
24 as to whether they are going to assert their claim against the
25 debtors, and I don't know if we've ever heard from FHFA whether

RESIDENTIAL CAPITAL, LLC, ET AL.

154

1 they intend to do it as well.

2 THE COURT: I'm going to be surprised, but go ahead,
3 Mr. Glenn.

4 MR. GLENN: Your Honor, we're not prepared to waive
5 our claims and --

6 THE COURT: I didn't expect you to.

7 MR. GLENN: -- in the claims allowance process the
8 irony is that we could then issue a subpoena under the rule --
9 the 7000 rules and get it as party discovery ironically.

10 THE COURT: No, it would be a contested matter under
11 9014 and the discovery rules, subject to the way the Court
12 would regulate it, would apply. But, of course, in the claims
13 allowance process estimation of a claim can be a much more
14 truncated and expedited proceeding than a district court
15 action.

16 MR. GLENN: That's correct.

17 THE COURT: So it wouldn't necessarily -- and look,
18 the completion of the litigation before Judge Cote, as
19 efficient as she is, will be, you know, with appeals is a time
20 consuming process. I think that the estimation process is
21 designed to deal with the situation where you can't really,
22 finally quantify a claim in the time needed to resolve a case.
23 Those issues aren't before me, but one shouldn't assume that
24 the same discovery, the same process applies in the claims
25 allowance process as would apply in the district court for any

RESIDENTIAL CAPITAL, LLC, ET AL.

155

1 action.

2 MR. GLENN: To answer the Court's question, the answer
3 is no. We're not preparing to waive our claim.

4 THE COURT: I didn't expect you would.

5 MR. GLENN: Thank you.

6 THE COURT: Thank you.

7 All right. Anybody else wish to be heard?

8 MS. MOSKOWITZ: Your Honor, just one procedural
9 question for you, something Your Honor said just raised a
10 question in my mind. We did make our submission on behalf of
11 the non-Ally underwriter defendants according to Your Honor's
12 schedule for supplemental submissions --

13 THE COURT: Right.

14 MS. MOSKOWITZ: -- on FHFA.

15 THE COURT: You did.

16 MS. MOSKOWITZ: So to the extent that Your Honor is
17 taking evidence, we would move for admission of the exhibits
18 submitted.

19 THE COURT: Well, you have a separate motion pending
20 so we'll wait till we get to your motion.

21 MS. MOSKOWITZ: Is that scheduled for some separate --

22 THE COURT: I don't know. Is it on the calendar, Mr.
23 Haims?

24 MR. HAIMS: I think it's actually noticed for today.

25 MS. MOSKOWITZ: That's what I thought.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

156

1 THE COURT: It is? I'm sorry.

2 MR. HAIMS: I think in their notice they noticed it
3 for the same day.

4 THE COURT: I'm sorry.

5 MS. MOSKOWITZ: I'm sorry; that's what I thought. So
6 I was just confused.

7 THE COURT: I apologize.

8 MS. MOSKOWITZ: So if --

9 THE COURT: I read everything, but I just -- I don't
10 focus, sometimes, on those little details.

11 MS. MOSKOWITZ: Right.

12 THE COURT: What is it that you're offering in
13 evidence?

14 MS. MOSKOWITZ: Your Honor, we would offer the
15 submission, which is docket number 1293 and the exhibits
16 submitted thereto, which are docket numbers 1293-1 through -9,
17 which it would include the affidavits, or declarations rather,
18 of two experts, Professor Arnold Barnett and Professor Chris
19 James, which are respectively 1293-9 and 1293-8, as well as the
20 underwriter or the defendants' submission, across all actions,
21 to the court on June 6th, which was 1293 --

22 THE COURT: When you say submissions I'm only
23 interested in the evidence.

24 MS. MOSKOWITZ: The evidence are those two exhibits
25 that were submitted in support that I just cited to Your Honor.

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

157

1 THE COURT: 1293-8 and 1293-9?

2 MS. MOSKOWITZ: Yes, Your Honor.

3 THE COURT: Are there any objections to those
4 declarations?

5 MR. HAIMS: No, Your Honor.

6 THE COURT: Mr. Glenn?

7 MR. GLENN: We're not a party to that motion. I don't
8 believe that motion is directed to us.

9 THE COURT: Okay.

10 MR. GLENN: We're not taking any position on any of --
11 anything in their pleadings.

12 THE COURT: Okay. All right. So the two declarations
13 that are ECF docket number 1293-8 and 1293-9 are admitted into
14 evidence for purposes of this hearing.

15 (Declaration of Professor Arnold Barnett was hereby received
16 into evidence as Credit Suisse's Exhibit 1293-8, as of this
17 date.)

18 (Declaration of Professor Chris James was hereby received into
19 evidence as Credit Suisse's Exhibit 1293-9, as of this date.)

20 MS. MOSKOWITZ: Thank you, Your Honor.

21 THE COURT: I'm going to take the matter under
22 submission. I do -- I am working on this but I want to see the
23 specific additional information that I requested that the
24 debtors provide with respect to the cost of producing within
25 sixty days the approximately 43,000 loan files. Okay?

1 **RESIDENTIAL CAPITAL, LLC, ET AL.**

1 UNIDENTIFIED SPEAKER: Yes, Your Honor.

158

2 THE COURT: All right. We're adjourned. Thank you
3 very much.

4 MS. MOSKOWITZ: Thank you.

5 (Whereupon these proceedings were concluded at 3:51 PM)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1

2 I N D E X

3

E X H I B I T S

4

DEBTORS'	DESCRIPTION	ID.	EVID.
5	Declaration and supplemental		86
6	declaration of Kanchana Wangkeo		
7	Leung in support of FHFA's motion		
8	seeking limited discovery from the		
9	debtors and relief from the		
10	automatic stay		
11	Declaration of Jeffrey A. Lipps		91
12	in support of debtors' objection		
13	to FHFA's motion for relief from the		
14	automatic stay		
15	Declaration and supplemental		91
16	declaration of John G. Mongelluzzo		
17	in support of debtors' objection		
18	to FHFA's motion for relief from the		
19	automatic stay		
20	Declaration of Mary Fahy Woehr in		
21	support of debtors' objection to		
22	FHFA's motion for relief from the		
23	automatic stay		
24	Declaration of Philip Marc Scheipe		91
25	in support of AFI's submission		

1

2 I N D E X

3

EXHIBITS (cont'd)

4

DEBTORS'	DESCRIPTION	ID.	EVID.
	Debtor's Exhibits 1 through 8		92

5

6

CREDIT	DESCRIPTION	ID.	EVID.
SUISSE'S			
1293-8	Declaration of Prof. Arnold Barnett		157
1293-9	Declaration of Prof. Chris James		157

7

8

9

10

11

12

13

RULINGS

14

15

16

17

18

19

20

21

22

23

24

25

		Page	Line
Motion regarding subservicing approved		53	10
Exclusivity period extended to 5 p.m.		71	9
Thursday, 12/20			
Debtors' unopposed motion for an order		76	3
extending the 365(d)(4) period to assume or			
reject executory contracts or leases granted			
Committee's application to retain and employ		78	13
San Marino Business Partners LLC as			
consultants to the committee approved			
Lift stay motions that had been resolved by		79	5
stipulations are approved by the Court			

1

2 C E R T I F I C A T I O N

3

4 I, Ellen S. Kolman, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

6

7

8



9

10 ELLEN S. KOLMAN

11 AAERT Certified Electronic Transcriber CET**D-568

12

13 eScribers

14 700 West 192nd Street, Suite #607

15 New York, NY 10040

16

17 Date: September 12, 2012

18

19

20

21

22

23

24

25